Supreme Court, U. S.
FILED
FEB 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—vs.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

JURISDICTIONAL STATEMENT

JEROME R. HELLERSTEIN
80 Pine Street
New York, New York 10005
(212) 344-1279

JOHN DWIGHT EVANS, JR.
MOBIL OIL CORPORATION
150 East 42nd Street
New York, New York 10017
(212) 883-4965

Attorneys for Appellant

Of Counsel:

WILLIAM B. RANDOLPH
80 Pine Street
New York, New York 10005

February 1, 1979

TABLE OF CONTENTS

PAGE

Jurisdictional Statement 1

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Questions Raised Below 3

Constitutional and Statutory Provisions Involved 4

Statement of the Case 4

The Questions Are Substantial 6

ARGUMENT—

I. The Tax on Appellant's Dividends Violates the Due Process Clause, Because There Is No Connection Between Its Business, Property or Operations in Vermont and the Foreign Source Dividends Taxed 9

II. The *Moorman* Case Should Not Be Extended to Permit Multiple Taxation of Dividends Paid Out of Foreign Earnings, Because to Do So Would Be Repugnant to the Foreign Commerce Clause and Incompatible With Established Congressional Policy. The Vermont Tax Should Be Invalidated Under the Foreign Commerce Clause 11

CONCLUSION 21

PAGE

APPENDIX A—

Determination of Appeal 1a

APPENDIX B—

Superior Court Order and Final Order 14a

APPENDIX C—

Vermont Supreme Court Opinion and Order 19a

APPENDIX D—

Notice of Appeal 32a

APPENDIX E—

Vermont Statutes Involved 35a

APPENDIX F—

Allocation or Apportionment of Dividends Included in the Tax Base 37a

TABLE OF AUTHORITIES

Cases:

Austin v. *New Hampshire*, 420 U.S. 656 (1975) 17

Brolan v. *United States*, 236 U.S. 216 (1915) 12

Chestnut Securities Co. v. *Oklahoma Tax Commission*, 125 F.2d 571 (C.A. 10th 1942), cert. denied, 316 U.S. 668 (1942) 18

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 16

Curry v. *McCanless*, 307 U.S. 357 (1939) 19

PAGE

Epstein v. *Lordi*, 261 F. Supp. 921 (D.C. N.J. 1966), aff'd 389 U.S. 29 (1967) 12

Evco v. *Jones*, 409 U.S. 91 (1972) 11

Frick v. *Pennsylvania*, 268 U.S. 473 (1925) 9, 11

General Motors Corp. v. *Washington*, 377 U.S. 436 (1964) 16

General Trading Co. v. *State Tax Commission*, 322 U.S. 335 (1944) 15, 17

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 15

International Harvester Co. v. *Department of Treasury*, 322 U.S. 340 (1944) 15, 16, 17

International Harvester Co. v. *Evatt*, 329 U.S. 416 (1947) 16

International Harvester Co. v. *Wisconsin Dept. of Taxation*, 322 U.S. 435 (1944) 19

McGoldrick v. *Berwind—White Coal Mining Co.*, 309 U.S. 33 (1940) 16

McGoldrick v. *Gulf Oil Corporation*, 309 U.S. 414 (1940) 15

McLeod v. *Dilworth Co.*, 322 U.S. 327 (1944) 15, 17

Michelin Tire Corp. v. *Wages*, 423 U.S. 276 (1976) 12

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157 (1954) 11

Miller Bros. Co. v. *Maryland*, 347 U.S. 340 (1954) 9, 11

Moorman Manufacturing Co. v. *Bair*, 437 U.S. 267 (1978) 6, 10, 11, 14, 15, 16

National Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753 (1967) 11

PAGE

National Geographic Society v. *California Board of Equalization*, 430 U.S. 551 (1977) 16
Norton Co. v. *Department of Revenue*, 340 U.S. 534 (1951) 9
Northwestern States Portland Cement Co. v. *Minnesota*, 358 U.S. 450 (1959) 16

Pacific Telephone and Telegraph Company v. *Franchise Tax Board*, 102 Cal. Reptr. 782, 498 P.2d 1030 (1972) 18

Southern Pacific Company v. *McColgan*, 68 Cal. App. 2d 48, 156 P.2d 81 (1945) 18

Treichler v. *Wisconsin*, 338 U.S. 251 (1949) 11

United Gas Corporation v. *Fontenot*, 241 La. 488, 129 So.2d 748 (1961) 18

Western Live Stock v. *Bureau of Revenue*, 303 U.S. 250 (1938) 16, 17
Wisconsin v. *J.C. Penney Co.*, 311 U.S. 435 (1940) 19

Statutes:

Internal Revenue Code
§243 ..... 5, 6
§245 6
§§901-902 6

Kentucky Revised Statutes
§141 7

Michigan Compiled Laws
§208 7

PAGE

Missouri Revised Statutes
§143 7

New York City Administrative Code, Ch. 46
Tit. A 21
Tit. L 20
Tit. R 20

New York Tax Law
Art. 9-A 20
Art. 28 21

Purdon's Pennsylvania Statutes Annotated
Title 72 7

Revenue Acts of 1918-1939 13

West Virginia Code
§11-24-6 7

Vermont Statutes Annotated, Title 32
§5811(18) 4, 5, 6
§5833 4

Constitution:

Commerce Clause, United States Constitution Article I, Sec. 8, cl. 3 ..... 2, 3, 4, 6, 7, 11, 12, 15, 16, 19, 20

Due Process Clause United States Constitution, Amendment XIV 2, 3, 4, 6, 9, 11, 19

Privilege And Immunities Clause, United States Constitution, Article IV, Sec. 2 17

Other Authorities:

Carlson, State Taxation of Corporate Income From Foreign Sources, Essays in International Taxation: 1976, Department of the Treasury, Washington, D.C. 7

PAGE

Dexter, Taxation of Income From Intangibles of Multistate and Multinational Corporations, 29 Vand.L. Rev. 400 (1976) 18

Governmental Finances in 1976-1977, Bureau of Census, U.S. Dept. of Commerce (GF 77, No. 5) 20

Hartman, State Taxation of Corporate Income from a Multistate Business, 13 Vand.L.Rev. 21 (1959) 17

Hearings, Senate Finance Com., Tax Reform Act of 1969, Part 6, p. 5088 [91st Cong. 1st Sess. Oct. 3, 1969] 13

House Ways and Means Committee Report, Revenue Bill of 1934 (H.R.Rep. No. 704, 73rd Cong., 2d Sess. Dec. 4, 1933) 15-16 13

Internal Revenue Service, Statistics of Income—1973, Corporation Income Tax Returns, U.S. Government Printing Office (1977) 8

State Taxation of Interstate Commerce, Report of Special Subcommittee on State Taxation of Interstate Commerce, House Judiciary Committee (88th Cong. 2d Session H.R. No. 1480) Vol. 1, p. 204 18

Watson, Allocation of Business Income for State Income Tax Purposes, 25 Minn.L.Rev. 851 (1941) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

MOBIL OIL CORPORATION,

Appellant,

—VS.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

JURISDICTIONAL STATEMENT

Mobil Oil Corporation, the appellant, appeals from the final decree of the Supreme Court of Vermont, dated November 9, 1978, holding that the Vermont income tax may be applied to appellant's dividend income derived from earnings outside the United States.

Opinions Below

The findings of fact and conclusions of law by the Commissioner of Taxes of the State of Vermont are found in the Commissioner's Determination of Appeal, dated April 11, 1974, which is set forth in Appendix A; the determination is unreported. The opinion of the Washington County Superior Court reversing the Commissioner's determination and holding in favor of the appellant is contained in that court's order, dated January 6, 1977 and the court's

final order, dated June 9, 1977, which are set forth in Appendix B; the orders are unreported.

The decision from which this appeal is taken is the order of the Vermont Supreme Court reversing the decision of the Superior Court. The order and opinion of that court, which are set forth in Appendix C, have not yet been reported. Notice of appeal (Appendix D) was filed in the Washington Superior Court, the court possessed of the record, on January 19, 1979.

Jurisdiction

The final decree of the Vermont Supreme Court was filed on November 9, 1978. This appeal is being docketed within 90 days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

Questions Presented

Whether the Due Process Clause of the Fourteenth Amendment or the Commerce Clause of the Constitution of the United States is violated by a State income tax imposed on dividends received by a corporation organized under the laws of a sister State in which the corporation maintains its commercial domicile, where:

(1) the dividends were received and their control, use and disposition were managed and directed, and the capital stocks on which the dividends were paid were held, managed and controlled by the corporation from its offices outside the taxing State;

(2) the dividends were derived from foreign source earnings of the payor corporations; and

(3) the only connection between the recipient corporation and the taxing State was the sale of products in that State.[1]

Questions Raised Below

The Due Process and Commerce Clause issues were raised by appellant in the administrative proceeding before the Vermont Commissioner of Taxes (P.C. 8-10), in its appeal to the Washington Superior Court (Opinion, App. B, p. 14a, and Appellant's Brief therein), and before the Vermont Supreme Court.[2] The Vermont Supreme Court said in its opinion, "As the superior court correctly noted in its order, the legal questions concerning apportionment and due process had already been answered adversely to Mobil's contentions by recent decisions of this Court", and went on to reverse the holding of the Washington Superior Court that the tax on appellant's dividends violated the Commerce Clause. (App. C, p. 22a).

---

[1] The decision below also dealt with the inclusion in the tax base of interest income. Because of the comparatively small amount of interest involved and appellant's desire to simplify the issues, this appeal is restricted solely to the dividend issue.

[2] In its brief filed in the Vermont Supreme Court, appellant [there the appellee] stated: "Mobil also contended below that the inclusion in the apportionable base of the dividends and interest at issue is contrary to §5833(a) and that such inclusion would constitute extraterritorial taxation, in violation of the Due Process Clause. Because this court has rejected essentially the same contentions in the *F. W. Woolworth* and *Goodyear cases, supra,* they are not being reargued in this brief. The appellee is not, however, waiving those contentions, but is reserving them for any further possible steps in this proceeding." (P. 6).

Constitutional and Statutory Provisions Involved

Commerce Clause (Art. I, §8, cl. 3):

> "The Congress shall have power . . . to regulate commerce with foreign Nations and among the several States, and with the Indian Tribes;"

Due Process Clause (Amend. XIV, §1):

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law;"

The pertinent sections of of the Vermont Statutes Annotated, Title 32, sections 5811(18) and 5833, are set forth in Appendix E.

Statement of the Case

During the years at issue, 1970, 1971 and 1972, appellant, a New York corporation, (Stipulation of Facts ["Stip"] ¶1, Supplemental Printed Case ["SPC"]—30), was engaged in the United States in the petroleum business, including exploration, production, refining, transportation, distribution and sale of petroleum and petroleum products, and in chemical and related mining businesses (Stip. ¶6, SPC—32). Appellant was engaged in interstate and foreign commerce. (Stip. ¶8, SPC—33). Appellant was subject to net income taxes or franchise taxes measured by net income imposed by Vermont and some 40 other States and the District of Columbia. (Stip. ¶8, SPC—33).

Appellant's corporate headquarters, principal place of business and commercial domicile were in New York City. (Stip. ¶7, SPC—32 and 33; App. A, p. 2a). Its only activity in Vermont was the wholesale and retail marketing of petroleum products and related products. (Stip. ¶9, SPC—33).

It had no oil or gas production or refineries in the State. (*Ibid.*)

Appellant owned the capital stocks of a large number of domestic and foreign corporations;[3] dividends were the major source of the appellant's taxable income. (*Id.* p. 5). In all respects, appellant's business as the owner of the stocks was conducted, managed and directed at the company's offices outside the State of Vermont. (Stip. ¶¶7 and 11, SPC—32-34). All dividends were received outside Vermont, and appellant's control and use of the dividends were managed and directed from its offices outside that State. (*Ibid.*) More than 99% of the dividends at issue were received by appellant from corporations deriving all, or all but an insignificant portion, of their income from sources outside the United States. (Stip. ¶26, SPC—39).

The assessment in controversy is based on the inclusion in the tax base, before apportionment, of 15% of the dividends received by appellant from domestic non-subsidiary corporations, in amounts ranging from approximately $17,800,000 to $25,900,000 for the years at issue, and 100% of the dividends received from subsidiaries and non-subsidiaries organized under the laws of foreign countries, in amounts ranging from approximately $156,000,000 to $264,000,000 (Ex. 8).[4]

---

[3] The term "domestic" corporation refers to a corporation organized under the laws of one of the States, and "foreign" corporation to a corporation organized under the laws of a foreign country.

[4] The Vermont income tax law conforms to the Federal corporation income tax rules by excluding from the tax base, before apportionment, all dividends received from 80% or more owned domestic U.S. corporations and 85% of the dividends received from such corporations that are less than 80% owned (subject to technical qualifications). (IRC § 243, Vt. § 5811(18), App. E, p. 35a). The State law also follows the Federal rule of including in the tax measure all the dividends received from corporations organized

The Questions Are Substantial

The following substantial Federal constitutional questions are presented by this appeal:

(1) This Court has never decided whether a State may impose an income tax on dividends received by a corporation that does business in the State, but is organized under the laws of a sister State in which its commercial domicile is located, where the dividends included in the apportionable base of the tax are received from stocks that are held, managed and controlled, and the dividends are received and the control, use and disposition of the dividends are managed and directed entirely outside the taxing State. Appellant contends that the Vermont tax on such dividends constitutes extra-territorial taxation in violation of the Due Process Clause.

(2) This case raises the question as to whether the recent decision of *Moorman Manufacturing Co.* v. *Bair* (437 U.S. 267 [1978]), in which this Court declined to intervene in a State tax apportionment challenged under the Due Process and Commerce Clauses, should be extended to dividends paid out of earnings derived from foreign sources, particularly in view of the long established Congressional policy of avoiding double taxation of foreign source income.

(3) In rejecting the Commerce Clause challenge to the tax at issue, the Vermont Supreme Court held that proof

---

under the laws of foreign countries (with exceptions not here applicable) (IRC §§243, 245, Vt. *ibid.*). Unlike the Federal income tax, the Vermont tax grants no credits for foreign income taxes paid either by the taxpayer or by a dividend paying foreign corporation, 10% or more of whose stock the taxpayer owns. (IRC §§ 901-902, Vt. *ibid.*).

of actual multiple taxation is a *sine qua non* to the invocation of the multiple taxation doctrine, whereas appellant contends that the test of prohibited multiple taxation lies in the power of various States to tax, regardless of whether that power has been exercised. The view expressed by the Vermont court threatens to undermine the cornerstone of this Court's approach to State taxation under the Commerce Clause during the past 40 years.

The taxation of dividends by the States is a matter of major fiscal importance to corporations engaged in interstate or foreign commerce, as well as to the States. There are 40 States and the District of Columbia that impose corporate taxes measured by net income which include dividends in the tax base.[5] Many of the States follow the Federal income tax rule of including in the measure of the tax 15% of the dividends received from domestic corporations that are less than 80% owned, and 100% of the dividends from foreign corporations.[6] It has been estimated that foreign source dividend income in the amounts of $2,200,000,000 from subsidiaries and $520,000,000 from non-subsidiaries was included in the corporate tax base of the States in 1972.[7]

The rules currently being applied by the various States for allocating or apportioning the dividends they include

---

[5] See Appendix F. In addition to the 40 States enumerated in the table, Kentucky, Michigan, Missouri, Pennsylvania and West Virginia also impose income taxes but they do not include any dividends in the tax base. See Ky. Rev. Stat. §141, CCH 10-400, 410; Mich. Comp. Laws §208, CCH 15-300, 304; Mo. Rev. Stat. §143, CCH 10-400, 435; Pa. Stat. Ann. Tit. 72, CCH 10-700; W. Va. Code §11-24-6, CCH 10-700, 715.

[6] Carlson, "State Taxation of Corporate Income From Foreign Sources", in *Esays In International Taxation: 1976*, Department of the Treasury, Washington, D.C. (1976), pp. 284-301.

[7] *Id.* at 266.

in the tax base vary sharply State to State.[8] Some States allocate all taxable dividends to the State if the corporation's commercial domicile is there located; otherwise the dividends are not taxed.[9] In other States, the same rule of allocation to the commercial domicile is followed if the dividends constitute "non-business" income, but if classified as "business" income, the dividends are apportioned even though the taxpayer's commercial domicile is located in another State.[10] A number of other States, including Vermont, apportion all dividends under their formulas, regardless of the location of the taxpayer's commercial domicile.[11] These and other variations in the current State patterns of taxing dividends[12] make it apparent that a large number of corporations engaged in interstate or foreign commerce are subject to risks of multiple State taxation of substantial amounts of dividends derived from foreign source earnings.[13]

---

[8] 40 States and the District of Columbia levy a tax on intercorporate dividends in whole or in part. Three of these States do not tax intercorporate dividends from foreign corporations which are paid from foreign source income. See App. F, p. 37a.

[9] Seven States fall into this category. See App. F, p. 37a.

[10] This is the method used by 18 States and the District of Columbia. *Ibid.*

[11] Eight States employ this apportionment principle. *Ibid.*

[12] Four other States apply a variety of disparate rules in attributing dividends to the State. *Ibid.*

[13] In 1973, more than 100,000 corporations reported net dividend income from foreign and domestic corporations on their Federal income tax returns. Internal Revenue Service, Statistics of Income —1973, Corporation Income Tax Returns, U. S. Government Printing Office (1977).

I

The Tax on Appellant's Dividends Violates the Due Process Clause, Because There Is No Connection Between Its Business, Property or Operations in Vermont and the Foreign Source Dividends Taxed.

(a)

Under the Due Process Clause, "while a State may shape its tax laws as to reach every object which is under its jurisdiction, it cannot give them extra-territorial operation". (*Frick* v. *Pennsylvania*, 268 U.S. 473, 489 [1925].) This Court has given "consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." (*Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 345 [1954]).

Here, since all of appellant's business and activities relating to its ownership, management and control of its stocks and the dividends they produced, were carried on outside the taxing State, the "definite link" or "minimum connection" required by the Due Process Clause to sustain the Vermont tax is missing. Moreover, there is no nexus between Vermont and the underlying earnings out of which the dividends were paid, since the payor corporations conducted no business, maintained no offices or employees, owned or leased no property, and derived no income from sources within the State. (Stip. ¶¶25-27, SPC—39).

The fact that appellant engages in the wholesale and retail marketing of products in Vermont does not warrant taxation of the income from its holding company and investment business conducted entirely outside the State. In *Norton Co.* v. *Department of Revenue* (340 U.S. 534, 537 [1951]), the Court stated:

> ". . . when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only by showing that particular transactions are disassociated from the local business and interstate in nature."

The requisite showing has been made in the instant case. All transactions and all of appellant's activities and operations having to do with the stocks and the dividends at issue were entirely disassociated from appellant's business in Vermont. On these facts, Vermont has no constitutional basis for taxing the dividends at issue.

(b)

Moorman Manufacturing Co. v. *Bair, supra,* is not inconsistent with the contention here being made, for that case dealt with a challenge to the State's method of apportioning admittedly taxable income. In *Moorman* the income arose from selling and warehousing carried on in the State, the taxability of which was conceded; the controversy related to Iowa's method of apportionment. The appellant in the instant case has no quarrel with Vermont's apportionment method, but instead makes the contention not at issue in *Moorman* that the State lacks jurisdiction under the Constitution to tax, or include the dividends in the tax base, under any method of apportionment. Indeed, in *Moorman* Iowa did not include in the taxable base or in the apportionment, the taxpayer's dividend income. (437 U.S. at 269).

While this Court has generally abstained from intervening in taxpayers' challenges to State methods of apportionment, except in the most flagrant cases, *Moorman* being the most recent and most articulate enunciation of

that policy, the Court has followed a different policy in dealing with jurisdiction of the States to tax. When it has been confronted with taxpayers' challenges to the power or jurisdiction of a State to tax, whether under the Due Process or the Commerce Clause, this Court has always recognized its constitutional role as arbiter between taxpayers and the various States.[14] Accordingly, the doctrine of the *Moorman* case has no bearing on the Due Process issue here raised.

II

The *Moorman* Case Should Not Be Extended to Permit Multiple Taxation of Dividends Paid Out of Foreign Earnings, Because to Do So Would Be Repugnant to the Foreign Commerce Clause and Incompatible With Established Congressional Policy. The Vermont Tax Should Be Invalidated Under the Foreign Commerce Clause.

(a)

The *Moorman* case does not govern the Commerce Clause issue in the instant case, because taxation of foreign commerce presents different considerations from those involved in taxation of interstate commerce.

The primacy and predominance of the Federal Government in dealing with the country's foreign relations, including commerce with other countries, is so well established as to require little more than a statement of the principle. As this Court recently stated, in passing on the validity of a State property tax on goods imported into this country, "The Federal Government must speak with

---

[14] Frick v. Pennsylvania, 268 U.S. 473 (1925); Treichler v. Wisconsin, 338 U.S. 251 (1949); Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954); National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954); Evco v. Jones, 409 U.S. 91 (1972).

one voice when regulating commercial relations with foreign governments." (*Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 [1976]). Consequently, decisions dealing with interstate commerce do not govern the distinctive issues arising when foreign commerce is at stake. As Chief Justice White declared, ". . . decisions of this court dealing with the power to regulate interstate commerce" do not govern questions arising under the Foreign Commerce Clause, because of "the broad distinction which exists between the two powers." (*Brolan* v. *United States*, 236 U.S. 216, 222 [1915]). A three Judge District Court has stated, ". . . when foreign commerce is involved the national interest is even more clearly paramount" than when State action affecting interstate commerce is involved. (*Epstein* v. *Lordi*, 261 F.Supp. 921, 931 [D.C. N.J. 1966], aff'd 389 U.S. 29 [1967]).

(b)

For decades, Congressional tax legislation has been based on the policy that foreign commerce conducted by United States based enterprises should be encouraged by eliminating double taxation of income from foreign sources. This has been done in part under the Federal income tax by granting to United States domestic corporations credits against income taxes paid to foreign governments. (I.R.C., §§901-904) The credit is granted not only for income taxes paid by the taxpayer to foreign governments, but it likewise extends to foreign income taxes paid by foreign corporations in which the taxpayer holds at least 10% of the voting stock (I.R.C., §902). This "indirect credit" comes into play at the time the income of the foreign corporation is paid or deemed paid to the United States corporation as a dividend. (*Ibid.*)

Double taxation of dividends paid by domestic corporations out of foreign source earnings is fully or partially

avoided under the Federal income tax by the general treatment of dividends from domestic corporations, whether based on United States or foreign source earnings. Dividends received from 80% or more owned domestic subsidiaries are entirely exempted from tax; and only 15% of the dividends received from less than 80% owned domestic corporations are taxed. (I.R.C., §243).

The Congressional policy of avoiding double taxation of foreign source earnings has been in force since the Revenue Act of 1918.[15] As characterized by the Treasury Department, the policy was designed "to avoid burdensome double taxation and to encourage foreign trade."[16] Under Secretary of the Treasury Stanley Surrey described the importance of the policy in the following words:

> "American investment would not proceed at all without the foreign tax credit because then, as the chairman pointed out, two taxes would be imposed and the overall burden of two taxes would be so great that international investment would practically cease."[17]

Because the States, unlike the Federal government, are not empowered to tax the global income of corporations (at least of corporations not domestic to the State), a different method of corporate income taxation is used by the States. Instead of granting foreign tax credits to avoid double taxation of income, the States utilize the allocation and

---

[15] See 1918, 1921, 1924 and 1926 Acts, §§222, 238; 1928, 1932, 1934, 1936, 1938 Acts, IRC (1939), §131; 1939 Act, §216 and the provisions of the IRC of 1954 cited in the text.

[16] House Ways and Means Committee Report, Revenue Bill of 1934 (H.R. Rep. No. 704, 73rd Cong., 2d Sess.) pp. 15-16.

[17] See Mr. Surrey's testimony before the Senate Foreign Relations Committee with respect to the United States—Brazil tax treaty, quoted in Hearings, Senate Finance Com., Tax Reform Act of 1969, Part 6, p. 5088 [91st Cong. 1st Sess. Oct. 3, 1969]).

apportionment method. In theory, this method is designed to tax only the income attributable to the State, and hence avoid overlapping State taxation of income. In practice, as the Court recognized in *Moorman*, multiple taxation often results from diverse allocation and apportionment techniques. Whether the *Moorman* principle of abstention by the Court from State tax apportionment and allocation issues should be extended to foreign source *operating* income of United States enterprises is not an issue posed by the case at bar. This case presents the narrower question as to whether *Moorman* should be extended to State taxation of foreign source *dividends*.

State taxation of dividends arising from foreign source earnings raises different questions from State taxation of direct operating income of a United States corporation arising from operations abroad. That is because, unlike the attribution of operating income, dividend income is allocated in toto by some States to the recipient's commercial domicile, whereas other States apportion dividend income in accordance with their formulas. (See App. F, p. 37a). Because no State allows a foreign tax credit against dividends, the consequence of these diverse and conflicting State rules is a clear and present danger of multiple State income taxation of dividends derived from foreign earnings.

(c)

In adjudging whether State legislation is invalid because it conflicts with Federal policy, this Court has not required a Congressional prohibition *in haec verba*. Instead, the standard used was stated as follows in a case passing on a Pennsylvania statute:

> "Our primary function is to determine whether . . . Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines* v. *Davidowitz*, 312 U.S. 52, 62 [1941]).

In *McGoldrick* v. *Gulf Oil Corporation*, (309 U.S. 414, 428-429 [1940]), in invalidating a local tax, the Court said that a "state tax . . . must fail as an infringement of the Congressional regulation of the commerce" if it violates "the purpose of the Congressional regulation".

There appears to be adequate basis for the invalidation of a State tax that subjects foreign source dividends to a risk of multiple taxation, on the ground that such taxation would conflict with the Federal tax policy designed to encourage foreign trade. Nevertheless, even if the Court does not make such a finding, it can conclude that, in view of the Federal policy, *Moorman* should not be extended to State tax allocation and apportionment of foreign source dividends.

Moreover, the Court in this case is not confronted with the necessity of prescribing a national uniform code of allocation and apportionment, as it indicated the taxpayer's position in *Moorman* would compel it to do. Here, the Court need only follow the precedent it has established in at least one other area of taxation under the Commerce Clause, namely, sales and use taxation, by holding that under the foreign Commerce Clause, one State and one State alone may tax dividends arising out of foreign source earnings.[18]

---

[18] The Court has sanctioned the power of the State of the buyer to impose on out-of-state vendors the duty to collect use taxes on sales of goods shipped from other States to customers within the State, while rejecting the power of the seller's State to tax such transactions. See Mr. Justice Rutledge's single opinion in McLeod v. Dilworth Co., 322 U.S. 327, 349, at 358, General Trading Co. v. State Tax Commission, 322 U.S. 335, and International Harvester

(d)

When this Court, beginning in the middle 1930's, swept away the traditional view that under the Commerce Clause "interstate commerce may not be taxed at all" and that the Commerce Clause created an area of trade free of State taxation, it by no means left the commerce unprotected, in the silence of Congress, from undue burdens of State taxation. In place of the tax-free haven doctrine, there was erected the multiple taxation doctrine, under which State taxes are held to conflict with the Commerce Clause, if they subject interstate or foreign commerce to a risk of multiple taxation not borne by intrastate commerce.[19]

The Vermont court has interpreted language in some of this Court's opinions as holding that proof of actual multiple taxation is a *sine qua non* to the invocation of the multiple taxation prohibition (App. C, p. 24a).[20] It is submitted that the Vermont court has misconstrued some passing statements in this Court's opinions. The multiple taxation doctrine as enunciated was unmistakably premised on the view that the validity of a State tax is determined in the light of the *power* of other States to tax interstate commerce, regardless of whether the power has been ex-

Co. v. Department of Treasury, 322 U.S. 340 (1944). As a consequence, interstate sales, like intrastate sales, are subject to tax, and the "out-of-state seller runs no risk of double taxation." National Geographic Society v. California Board of Equalization, 430 U.S. 551, 558 (1977).

[19] Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940); International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944); International Harvester Co. v. Evatt, 329 U.S. 416 (1947).

[20] The cases cited were the Moorman case; Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278 (1977); General Motors Corp. v. Washington, 377 U.S. 436, 449 (1964); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 462-63 (1959).

ercised.[21] No other rule is viable or appropriate to the delineation of State powers of taxation under our Federal system. State taxing powers cannot be made to turn on a competitive race by the States in exercising their taxing powers. This Court recently reaffirmed that principle in holding unconstitutional, under the Privilege and Immunities Clause, New Hampshire's commuter's tax, by saying:

> "Nor . . . can the constitutionality of one State's statutes affecting nonresidents depend upon the present configuration of the statutes of another State." (*Austin* v. *New Hampshire*, 420 U.S. 656, 666 [1975]).

(e)

The decision below subjects appellant to a risk of multiple taxation not borne by intrastate commerce, because the State of a corporation's commercial domicile has long been recognized as having the constitutional power to tax dividends in full, and there is no legitimate constitutional basis for depriving it of that power. Allocation of dividends to the taxpayer's commercial domicile, based on the doctrine of *mobilia sequuntur personam*, was the traditional method used in State taxation.[22] Although the question has

[21] See Western Live Stock v. Bureau of Revenue, supra, 303 U.S. at 256, and Mr. Justice Rutledge's single opinion in McLeod v. Dilworth Co., 322 U.S. 327, 349, at 358 (1944), General Trading Co. v. State Tax Commission, 322 U.S. 335, and International Harvester Co. v. Department of Treasury, 322 U.S. 340.

[22] See the survey made in 1941 in Watson, "Allocation of Business Income for State Income Tax Purposes", 25 Minn. L. Rev. 851, 858-862. In a 1959 study, Professor Paul Hartman reported that of the 34 States then imposing corporate taxes measured by net income, specific allocation was provided by explicit provision in 15 of the States and the District of Columbia, in most cases to the State of the taxpayer's principal place of business or its domicile. "State Taxation of Corporate Income from a Multistate Business", 13 Vand. L. Rev. 21, 49, 59. In five other States the specific

never been decided by this Court, the power of the State of a corporation's commercial domicile to tax the corporation's dividends, without apportionment, has been sustained over the years by intermediate Federal and by State Courts.[23]

In recent years, a number of States have sought to apportion taxable dividends, including dividends derived from foreign source earnings, along with operating income.[24] If the apportionment utilized in this case by Vermont should not be reversed, multinational businesses would be subjected to a risk of multiple taxation of dividends from foreign source earnings. By way of contrast, a corporation conducting an intrastate business in a single State and receiving dividends from other corporations doing

---

allocation provisions were less clear, but the author regarded them as broad enough to include dividends; in eight States there were no specific allocation provisions. *Id.* at p. 61. See also "State Taxation of Interstate Commerce", Report of Special Subcommittee on State Taxation of Interstate Commerce, House Judiciary Committee (88th Cong. 2d Session H.R. No. 1480), Vol. 1, p. 204, *et seq.*

[23] Chestnut Securities Co. v. Oklahoma Tax Commission, 125 F. 2d 571 (C.A. 10th 1942), cert. denied, 316 U.S. 668 (1942); Southern Pacific Company v. McColgan, 68 Cal. App.2d 48, 156 P. 2d 81 (1945); see United Gas Corporation v. Fontenot, 241 La. 488, 129 So. 2d 748 (1961); Pacific Telephone and Telegraph Company v. Franchise Tax Board, 102 Cal. Reptr. 782, 498 P. 2d 1030 (1972).

[24] The Uniform Division of Income for Tax Purposes Act has been adopted by 25 States either *in haec verba* or in substantially the form of the Model Act. (See CCH State Tax Guide, All States ¶10-000). The Multistate Tax Commission has issued advisory regulations which give a sweeping construction to the term "business income". (See P-H, All States Unit ¶6100). Since these regulations have been adopted by a number of States (see Dexter, "Taxation of Income From Intangibles of Multistate and Multinational Corporations," 29 Vand. L. Rev. 401, 404 [1976]), it appears likely that if the decision below is not reversed, many States will seek to apportion the type of dividends involved in the instant case.

business in the taxing State or other States, would be subject to no such risk; its dividends would be taxable by only one State. That is because the Due Process Clause prevents a State from taxing dividends to a foreign corporation not doing business in the State, even though the dividends were derived from the payor corporation's earnings within the State.[25]

Accordingly, if the decision below should be allowed to stand, corporations such as the appellant would be subjected to tax burdens not borne by intrastate commerce.

(f)

If the Commerce Clause doctrine is applied to the diverse methods of attributing foreign source dividend income to the various States so as to preclude multiple taxation, principle, as well as history, points to the recognition of the power of the State of the recipient's commercial domicile to allocate the dividends in toto to its tax. Tested by any accepted fiscal policy on which State income taxation of a corporation is grounded—the source of the income, the benefits and protection afforded, or the costs of the business to the State (see *Curry* v. *McCanless,* 307 U.S. 357, 367-368 [1939])—the claim of the State of commercial domicile to tax in their entirety the dividends of a corporation, all of whose business and activities as a holding and investing company are conducted in that State, is very compelling, whereas the claim of the States in which only manufacturing, selling or other operating functions are carried on to tax the dividends on an apportioned basis is without justification.

---

[25] See Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940), and Roberts J. dissenting at 448-450; International Harvester Co. v. Wisconsin Dept. of Taxation, 322 U.S. 435 (1944), and Jackson, J. dissenting at 448.

In the opinion below, it was stated that, "[i]f Mobil's Commerce Clause argument prevailed, Mobil and similar corporations could effectively avoid taxation of the majority of their taxable income if the commercial domicile for any reason declined to tax to the full measure of its ability." The statement was presumably based on the fact that New York taxes only a portion of such dividends and some States do not tax them at all. See App. F, p. 37a; and *supra* note 5). The Vermont court has ignored the fact that the franchise or income tax is not the only State tax to which corporations are subject. A proper perspective requires consideration of the entire tax structure of the States and localities involved.

New York has one of the heaviest State and local tax burdens in the country, collecting annual per capita taxes of $1,252, as compared with the median of $749 for all States.[26] Corporations doing business in New York City, where appellant's principal office is located, are subject to both a State and a New York City tax on their net income, to both State and City sales and use taxes and high property and other taxes.[27]

---

[26] The figures are for 1976-1977, the latest available. The New York per capita tax load is the highest in the country, except for Alaska. See "Governmental Finances in 1976-1977," Bureau of Census, U.S. Dept. of Commerce (GF 77, No. 5).

[27] The following table summarizes the major taxes, in addition to property taxes, to which New York City businesses are subject.

Tax	*Rate*
New York State corporation franchise tax on net income (Art. 9-A)	10%
New York City general corporation tax on net income (Ch. 46, Tit. R)	9%
New York City commercial rent and occupancy tax (Ch. 46, Tit. L)	6¾% on rent in excess of $11,000

(table continued on following page)

Moreover, it is the prerogative of the State of commercial domicile to waive taxation, in whole or in part, of dividends properly within its province in order to effectuate its social or economic policies. That should not increase the constitutional power of other States to tax the dividends.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of the appeal.

Dated: February 1, 1979

Respectfully submitted,

JEROME R. HELLERSTEIN
80 Pine Street
New York, New York 10005
(212) 344-1279

JOHN DWIGHT EVANS, JR.
MOBIL OIL CORPORATION
150 East 42nd Street
New York, New York 10017
(212) 883-4965

Attorneys for Appellant

Of Counsel:

WILLIAM B. RANDOLPH
80 Pine Street
New York, New York 10005

Tax	*Rate*
New York State sales and use tax (Art. 28)	4%
New York City sales and use tax (Ch. 46, Tit. A)	4%

The references to New York State taxes are to the New York Tax Law, and the references to New York City taxes are to the City's Administrative Code.

Appendices

Appendix A

(Dated April 11, 1974)

STATE OF VERMONT

DEPARTMENT OF TAXES

Mobil Oil Corporation
Corporate Income Tax
1970, 1971 and 1972

DETERMINATION OF APPEAL

This is a determination of the timely appeal under 32 V.S.A. § 5883 of the taxpayer, Mobil Oil Corporation (Mobil) from the deficiencies assessed by the Vermont Department of Taxes for Corporate Income Taxes covering the years 1970, 1971 and 1972. In addition, the taxpayer has petitioned under 32 V.S.A. § 5833(b) for a modification of the Corporate Income apportioned to Vermont. The deficiencies contested for the years in issue are as follows:

Tax	*Tax paid*	*Additional tax*	*Interest*	*Total*
1970:				
$19,078.56	$4,000.00	$15,078.56	$ 339.27	$15,417.83
1971:				
$31,955.52	$ 750.00	$31,205.52	$ 858.15	$32,063.67
1972:				
$25,384.69	$ 25.00	$25,359.69	$ 443.80	$25,803.49
Totals:				
$76,418.77	$4,775.00	$71,643.77	$1,641.22	$73,284.99

Appendix A

A hearing was held before the Commissioner of Taxes on November 8, 1973 in Montpelier, Vermont. At the hearing the taxpayers presented to the Tax Department a proposed Stipulation of Facts. The Commissioner of Taxes did not sign that proposed Stipulation of Facts. The issues involved for all three years are basically the same with the one difference being in the year 1970 where "gross up" is also at issue. A protest was filed for 1970 and 1971. There was never a hearing on either of these years due to pending litigation involving a different taxpayer on similar issues. However, both years are considered in this determination based on the request of the taxpayer.

FACTS

During the years at issue the taxpayer was a New York corporation with the corporate headquarters at 150 East 42nd Street, New York, New York. The taxpayer files its Corporate Income Tax returns on a calendar year basis ending December 31. For the years in issue Mobil Oil Corporation filed its Vermont Corporate Income Tax return with a reduction of amounts from the Federal Income Tax return reported on line 30 of taxable income which were represented by taxpayer as being nonapportionable income. The amounts not included were represented under the headings of dividends, interest, and foreign taxes. The Vermont departmental auditor adjusted the reported taxable income and restored to the Federal taxable income all of the reductions with the exception of interest on U.S. government obligations. Interest on U.S. government obligations is allowable as a deduction on the Vermont Corporate Income Tax return. In addition, "gross up" was allowed as a deduction for 1971 and 1972 in accord with the 1971 Amendment to 32 V.S.A. § 5811(18). The figures were

Appendix A

ascertained from schedules supporting the Vermont returns and included in the Federal returns. The dividends which had been deducted by the taxpayer included total dividends from both foreign and domestic sources. Interest deducted by Mobil represented amounts termed "non-operating interest".

During the years at issue the taxpayer was engaged in interstate commerce in Vermont and other states throughout the United States and was also engaged in foreign commerce between the United States and various other countries in the world. It is principally engaged in the petroleum business including exploration, production, refining, transportation, distribution and sale of petroleum and petroleum products. In addition, taxpayer conducts petro-chemical, paint and other related operations.

During the years at issue the taxpayer received dividends from both subsidiary and nonsubsidiary corporations. The stock of such corporations was held, managed and controlled entirely outside of Vermont. Allegedly the payment of all dividends was received by the taxpayer outside Vermont. Finally, the taxpayer alleges that the control, use and disposition of the dividends was managed and directed outside Vermont.

A substantial portion of the dividends received by taxpayer were dividends from the Arabian American Oil Company (ARAMCO), a Delaware Corporation in which Mobil has a 10% interest through stock ownership. It is contended that ARAMCO derived all of its operating income from sources outside the United States and, to a substantial extent, in foreign commerce and the conduct of the petroleum business. It is further alleged that ARAMCO conducts no business, owns no property, maintains no office nor has any employees in Vermont and

derived no income from sources in Vermont during the years in issue. ARAMCO maintains offices in the State of New York and the District of Columbia from which certain non-operating functions such as purchase of supplies and equipment and coordination of shareholder and government relations are conducted. Other miscellaneous services are also rendered. The remaining dividends in the years in question were from corporations which conducted no business, owned or leased no property, and maintained no office nor had any employees within either Vermont or the rest of the United States.

Taxpayer makes the following contentions:

A. The amount of taxpayer's Vermont net income apportioned to Vermont does not represent a fair and equitable portion of the taxpayer's income within the meaning of 32 V.S.A. § 5833. The taxpayer contends that the Commissioner of Taxes in his notice of deficiency illegally and erroneously applied the Vermont Income Tax to interest and dividends from sources outside the State of Vermont which did not relate to the taxpayer's business in Vermont and thereby subjected to taxation an unequitable portion of Mobil's net income.

B. Taxation under the Vermont Corporate Income Tax statute violates the Due Process of Law requirement of the Fourteenth Amendment to the Constitution of the United States in that the taxpayer's management of its stock interests in subsidiaries and non-subsidiary corporations, its operations as a holding company and activities as an investor in stocks and obligations take place entirely outside of Vermont. Such activities of the taxpayer are distinct and separable from its business in Vermont; no part of the income derived therefrom is attributable to Vermont;

and inclusion thereof in the apportionment formula constitutes extra-territorial taxation in violation of the Vermont and United States Constitutions.

C. Taxation by Vermont of any part of the dividends and interest violates the Interstate and Foreign Commerce Clauses of the Constitution of the United States (Art. 1, Sec. 8, Cl. 3) for the following reasons:

(1) The tax assessment results in the extra-territorial taxation of taxpayer's income and imposes an undue burden on interstate commerce.

(2) The State of New York in which the taxpayer maintains its commercial domicile has the constitutional power to allocate to that state and tax in full all of the taxpayer's dividends and interest income. The inclusion of such income in the apportionable base therefore subjects the taxpayer to a risk of multiple taxation and to cumulative tax burdens to which corporations conducting exclusively intrastate business in Vermont are not subject. Therefore, such treatment is repugnant to the Commerce Clause.

(3) With regard to the receipt by the taxpayer of dividends and interest from corporations conducting their business in foreign countries, the taxpayer is subject to the power of such countries to tax the dividends and interest without the protection to the taxpayer which the Due Process Clause, Commerce Clause and the other United States constitutional limitations on taxation by the states in this country provide. The inclusion of such income in the apportionment formula imposes a burden on foreign commerce and is repugnant to the Foreign Commerce Clause. The tax as assessed is in conflict with the Federal tax policy embodied in the Federal legislation which is de-

signed not to discourage foreign operations of United States businesses.

D. The apportionment made in the deficiencies does not fairly represent taxpayer's business activity in Vermont for the taxable years in issue and taxpayer has petitioned for modification thereof in accord with 32 V.S.A. § 5833(b).

E. The foreign taxes paid or accrued in the years in issue which were claimed as a credit against the United States Corporation Income Tax should be deductible for purposes of determining Vermont Corporate Income Tax under 32 V.S.A. § 5811(18).

Discussion

I. Whether the Apportionment of Income Formula in Vermont Represents a Fair and Equitable Portion of Taxpayer's Income Subject to Vermont Corporate Income Tax.

Consideration of the Vermont Apportionment Formula must be guided by reference to *F.W. Woolworth* v. *Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972). The Court in *Woolworth* stated that where it does not appear the formula of apportionment of the corporate taxpayers income is intrinsically arbitrary, that it operates unreasonably, or violates the constitutional rights of the taxpayer, such apportionment formula is valid. Further, in *Woolworth* the Court found that the statutory formula in Vermont is a three-factor formula which is used by a majority of the states imposing corporate income taxes and is a practical approximation of the distribution of either a corporation's sources of income or the social costs which it generates. The Vermont Supreme Court in the *Woolworth* decision specifically stated at 130 Vt. 544, 549:

> "In its holding the court in *Gulf Oil Corp.* v. *Morrison*, supra, 120 Vt. 330 held the inclusion of dividends in the allocation formula did not serve to make the formula operate in an arbitrary manner.
>
> . . .
>
> This court's approach towards the inclusion of such items of net income as dividends and capital gains in the allocation formula for franchise taxation purposes has been accepted in other jurisdictions. The basic rationale of their inclusion was stated in *F.W. Woolworth Co.* v. *Director, Division of Taxation*, 45 N.J. 466, 213 A.2d 1, 9 (1965) where that court said:
>
> . . .
>
> 'the realistic value of the exercise of a franchise in a particular state is enhanced and contributed to by the worth or income of the entire enterprise. . .'
>
> Typically, this approach is followed where there is unity in use and management of the enterprise being taxed."

While the Court, as a basis for its rationale, was referring to corporate franchise taxes, the actual decision in the *Woolworth* case related to the Corporate Income Tax which is now challenged by Mobil. Thus, the inclusion of dividends in the net income to be apportioned under the three-factor formula is neither arbitrary nor unconstitutional. Similar reasoning applies to the consideration of interest income. See: *In re: United States Steel Corporation* (Idaho Board of Tax Appeals, No. 73-1-20, 1973).

It is settled law that a state which provides an orderly market in which to transact business confers benefits which constitutionally justify the levy of an income tax. *Wiscon-*

sin v. *J.C. Penny Co.*, 311 U.S. 435. The formula for determining income to be taxed is a policy decision for the Legislature. *General Motors* v. *District of Columbia*, 380 U.S. 553 (1965); *Northwestern Cement Co.* v. *Minnesota*, 358 U.S. 450. A heavy burden lies on the party challenging constitutional validity of a tax apportionment formula. It must show by clear and convincing evidence that the use of a particular formula results in the taxation of extra territorial values. *Butler Brothers* v. *McColgan*, 315 U.S. 501 (1942); *Norfolk and Western Railroad* v. *North Carolina*, 297 U.S. 682; *Han's Ree's Sons, Inc.* v. *North Carolina et al. Maxwell*, 283 U.S. 123 (1931).

Finally, in *International Harvester Co.* v. *Evatt*, 329 U.S. 416 (1947), the U.S. Supreme Court noted that exact apportionment is not required. A rough approximation rather than precision is sufficient. See also *F.W. Woolworth Co.* v. *Commissioner of Taxes*, 130 Vt. 544, 554-556 for the judicial history of the above statements in Vermont. Thus, the three-factor formula to apportion income to the state is the general rule and the exceptions thereto should be used sparingly. See: *Donald M. Draker Co.* v. *Department of Revenue*, 263 Oregon 26, 500 P.2d 1041 (1972). It is clear that the net income of a corporation from exclusively interstate activities is subject to state taxation provided the levy is not discriminatory and the income is properly apportioned. See: *General Motors, Inc.* v. *Colorado*, —— Colo. ——, 509 P.2d 1260 (1973). Further, there exists a presumption in favor of the constitutionality of an apportionment formula which relies on the use of several factors. *General Motors, Inc.* v. *Colorado, supra.* It is clear that Vermont has adopted the three-factor formula and includes dividends and interest in income as amounts to be apportioned by the formula. The inclusion of dividends

and interest in a taxpayer's income for apportionment is perfectly appropriate. Where a taxpayer does business both within and without Vermont, as does Mobil, it is required to determine the portion of its net income apportionable to Vermont under the provisions of 32 V.S.A. § 5833. Further, the Vermont Corporate Income Tax is imposed on income earned or received in a taxable year under 32 V.S.A. § 5832. Certainly, both interest and dividends are clearly includible in "the taxable income of the taxpayer . . . under the laws of the United States" under 32 V.S.A. § 5811(18). Such dividends and interest are therefore includible in Mobil's net income a portion of which is attributable to Vermont. Whether such items are "operating" or "non-operating" type income does not make them any the less items of income. See: *In re: United States Steel Corporation, supra.*

II. Whether There Is a Violation of the Due Process Clause of the Fourteenth Amendment Where Mobil Managed Stock Interests in Subsidiary and Nonsubsidiary Corporations.

Taxpayer contends that its ownership and management of stock interests in subsidiary and nonsubsidiary corporations and its operations as a holding company takes place entirely outside of Vermont. Such activities are alleged to be distinct and separate from Mobil's business in Vermont. Therefore, the inclusion of income derived from such stock ownership in the apportionment formula constitutes extra-territorial taxation in violation of the Fourteenth Amendment. This exact question has already been answered by the Vermont Supreme Court in *F.W. Woolworth Co.* v. *Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972). The Court stated at 130 Vt. 544, 556 "for this reason we

conclude that the formula as applied to Woolworth is constitutional". So also is the apportionment formula constitutional when applied to the taxable income of Mobil. It is Mobil's total income which is subject to the apportionment formula in Vermont.

III. Whether the Vermont Apportionment Formula Violates Interstate and Foreign Commerce Clauses of the Constitution of the United States (Art. 1, Sec. 8, Cl. 3).

One of the leading cases in this area is *U.S. Glue Co.* v. *Oak Creek*, 247 U.S. 321 (1918), in which the Court held that the State of Wisconsin was entitled to include in the computation of net income, income derived from transportation in interstate commerce. The Court pointed out that a tax on net profits is not a burden on interstate commerce since it does not arise at all unless a gain is shown over and above expenses and losses. The tax cannot be heavy unless the profits are large. Such a tax would constitute one of the ordinary and general burdens of government to which persons and corporations otherwise subject to the jurisdiction of the states are not exempted because they happen to be engaged in commerce among the states. Thus, it appears that there is no burden on interstate commerce by the imposition of the Vermont apportionment formula. For similar reasons there would be no burden on a foreign commerce by the application of the Vermont apportionment formula.

IV. Whether the Vermont Apportionment Formula Fairly Represents the Business Activities of the Taxpayer in Vermont.

As is noted above, the use of the apportionment formula found in 32 V.S.A. § 5833 is accepted in many states with

minor variations throughout the United States and is considered to be the rule rather than the exception. Any diversion from the standard formula imposes a strong burden of proof on the taxpayer to show that the formula does not fairly represent its business activities in the State of Vermont. See: *General Motors, Inc.* v. *Colorado, supra.* Mobil has made no such showing in this case. See: *F.W. Woolworth* v. *Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972); *Gulf Oil Corp.* v. *Morrison*, 120 Vt. 324, 144 A.2d 671.

V. Whether Vermont Must Allow Taxpayer to Deduct the Amount of Foreign Taxes That Were Used as a Credit for Federal Taxation Purposes.

In computing Federal Income Tax, a corporation which pays income tax to a foreign country may elect either to deduct the foreign tax paid under 26 U.S.C. § 164, or to credit that amount under 26 U.S.C. § 901 against the tax liability. The § 901 credit is the so-called direct foreign tax credit. In addition, a domestic corporation owning at least 10% of the voting stock of a foreign subsidiary corporation from which it receives its dividends may take a credit under 26 U.S.C. § 902 for the foreign tax paid by the subsidiary on the portion of the subsidiary earnings from which the dividends are paid to the corporation. This is the so-called "deemed paid" foreign tax credit. If the deemed paid credit is not elected, the shareholder includes in income only the amount of the dividend. However, if the deemed paid credit is elected, 26 U.S.C. § 78 requires a shareholder to treat as a dividend the amount equal to the tax it has been deemed to have paid under 26 U.S.C. § 902. Thus, it is apparent that Mobil had an election with regard to foreign taxes paid or deemed paid for federal

purposes. Mobil Oil in the years in issue chose to exercise its election for federal purposes to include foreign taxes paid and taxes deemed paid in gross income and to take the tax credit against its tax liability. Having made the election for federal purposes, Mobil is bound by that election for the determination of the Vermont net income.

Under provisions of 32 V.S.A. § 5832(1), a 6% Income Tax is imposed on the Vermont net income of a corporation for the taxable years which is allocated or apportioned to the state under § 5833. Under the provisions of 32 V.S.A. § 5811(18) "Vermont net income" is defined for corporate taxpayers as the taxable income of a taxpayer for the taxable year under the laws of the United States. For federal purposes, taxable income is determined by establishing a gross income and deducting from that all allowable deductions to arrive at taxable income. There is no provision in the Vermont statute to allow a taxpayer having an election for federal purposes to deduct or to take a credit for taxes to take a credit in the federal case and then for Vermont purposes not take the credit but take the deduction. Again, the Vermont Supreme Court accepts the position that Vermont net income is measured by the taxable income as shown on the federal return. See *F.W. Woolworth Co.* v. *Commissioner of Taxes,* 130 Vt. 544, 554. Accordingly, the taxpayer may not compute taxable income and tax liability one way for federal purposes and another way for Vermont purposes.

CONCLUSION

1. Mobil Oil Corporation must compute Vermont net income based on the Federal net income.

2. The petition of Mobil Oil Corporation to modify the apportionment formula is hereby denied since the apportionment formula in 32 V.S.A. § 5833(a) properly reflects taxpayer's business activity in the State of Vermont.

3. The apportionment formula used for Vermont purposes to determine Corporate Income Tax is constitutional and has been properly applied by the Vermont Department of Taxes.

4. The apportionment formula as applied by the Vermont Department of Taxes to Mobil Oil Corporation does not violate any of the constitutional rights of Mobil Oil Corporation.

5. The question of "gross-up" for 1970 will be determined in accord with the decision of the Vermont Supreme Court in *F.W. Woolworth* v. *Vermont Department of Taxes* which is presently on appeal.

Accordingly, the assessments of the Vermont Department of Taxes must stand affirmed.

Dated this 11th day of April, 1974 at Montpelier, Vermont.

/s/ ROBERT G. LATHROP
Robert G. Lathrop
Commissioner of Taxes

Appendix B

Order filed January 7, 1977
Beverly J. Smith, Clerk
Final Order filed June 10, 1977

WASHINGTON SUPERIOR COURT

DOCKET No. C13-74 Wnm

STATE OF VERMONT,
WASHINGTON COUNTY, SS.:

MOBIL OIL CORPORATION

VS.

COMMISSIONER OF TAXES

ORDER

This is an appeal by Mobil Oil Corporation, hereinafter referred to as plaintiff, from the decision of Robert G. Lathrop, Commissioner of Taxes for the State of Vermont, hereinafter referred to as defendant, denying plaintiff relief from deficiencies assessed with respect to its 1970, 1971 and 1972 Vermont Corporate Income Taxes; and also denying plaintiff's petition for modification of the Vermont Apportionment of Income Formula.

This cause has been submitted for determination upon the record compiled before the defendant, including a sworn statement of facts submitted by plaintiff in lieu of testimony; the representations of counsel; and the pertinent authorities.

Appendix B

During the subject years, plaintiff was a New York corporation, with its headquarters at New York City, and it was registered to do business in Vermont. It was engaged in the exploration for and the production, refining, transportation, distribution and sale of petroleum and related products in the United States; it conducted petrochemical coatings, plastic and phosphate mining businesses; and it directly or indirectly owned capital stock of numerous foreign subsidiary and five percent or more of certain domestic and foreign nonsubsidiary corporations. All of plaintiff's interests were held, controlled and managed outside the State of Vermont and its activities within this jurisdiction were restricted solely to the wholesale and retail marketing of petroleum products.

Plaintiff filed its federal and Vermont income tax returns on a calendar year basis. During the subject years, on the Vermont returns, it reduced the amounts reported on the federal returns for foreign source dividends and interest income received during all years and a 26 U.S.C. 78 "gross up" for 1970. The Department of Taxes restored all of the reductions with the exception of interest on United States obligations. While the "gross up" for 1970 was included, they were allowed as deductions in 1971 and 1972, and defendant has agreed to modify it for the year 1970, in a manner consistent with the decisions in *F.W. Woolworth Company* v. *Commissioner of Taxes* (1974) 133 Vt. 93, and *In re Goodyear Tire and Rubber Company* (1975) 133 Vt. 132.

There are no issues of fact for determination. The legal issues presented largely have been answered by the Vermont Supreme Court in *In re Goodyear Tire and Rubber Company*, supra, *F.W. Woolworth Company* v. *Commissioner of Taxes*, supra; and *F.W. Woolworth Company* v.

Commissioner of Taxes (1972) 130 Vt. 544, and the principles established in those decisions are binding.

However, because the commercial domicile of plaintiff does have the authority to tax investment dividends and interest without apportionment; because the capacity to tax, and not the actual imposition of same, is the test, such income could be the subject of prohibitive multiple taxation by inclusion in the Vermont apportionment base. (See Plaintiff's Reply Brief, cases cited).

Therefore, this cause is remanded for determination of that issue, and adjustment relative to the 1970 gross up.

Dated at Montpelier, Vermont, this 6th day of January 1977.

/s/ JOHN P. MORRISSEY

/s/ WILLIS C. BRAGG

/s/ MARILYN M. DURANKAU

Judges, Washington Superior Court

SUPERIOR COURT—WASHINGTON COUNTY

Civil Action, Docket No. C13-74 Wnm

STATE OF VERMONT,
WASHINGTON COUNTY, SS.:

MOBIL OIL CORPORATION

v.

COMMISSIONER OF TAXES

FINAL ORDER

This cause came on before the Washington Superior Court upon the parties' June 8, 1977, Stipulation for Final Order. Upon consideration of the Stipulation for Final Order, the record before this Court, and the representations and arguments of counsel, it is hereby

ORDERED, that the Interlocutory Order in this action, dated January 6, 1977, be and it hereby is adopted as the final order of this Court; and it is further

ORDERED, that the Appellant's Vermont Corporate Income Tax liability for the years 1970, 1971, and 1972 be and it hereby is determined in accordance with the re-computation contained in the Stipulation for Final Order, with resulting tax liability as follows:

1970	$2,923.26
1971	1,207.64
1972	25.00

Appendix B

Dated at Montpelier, Vermont this 9th day of June 1977.

/s/ JOHN P. MORRISSEY

/s/ WILLIS C. BRAGG

/s/ MARILYN M. DURANKAU

Judges, Washington Superior Court

Approved as to form and substance:

MOBIL OIL CORPORATION

By: /s/ DOUGLAS C. PIERSON
Douglas C. Pierson, Esq.

By: /s/ JEROME R. HELLERSTEIN
Jerome R. Hellerstein, Esq.

Attorneys for the Appellant

/s/ RICHARD JOHNSTON KING

Appendix C

(Filed in Clerk's Office November 9, 1978)

No. 160-77

On Appeal From
Washington Superior Court

June Term, 1978

COMMISSIONER OF TAXES

v.

MOBIL OIL CORPORATION

Present:

Barney, C.J., Daley, Larrow, Billings, and Hill, JJ.

BILLINGS, J. The Commissioner of Taxes (Commissioner) appeals from a final order of the Washington Superior Court redetermining defendant-appellee Mobil Oil Corporation's (Mobil's) income tax liability to the State of Vermont for the years 1970 through 1972 inclusive. The superior court determined that the Commissioner's application of the Vermont corporate income tax to certain of Mobil's dividend and interest income offended the Commerce Clause of the United States Constitution. We reverse.

Vermont imposes an annual apportioned net income tax on corporations authorized to do business within the state or receiving income allocable to Vermont because of business activity within the state. 32 V.S.A. §§ 5811(15), 5831-33. The application of this tax involves a number of steps. Once it has been ascertained that a corporation is a taxable

Appendix C

corporation, 32 V.S.A. § 5811(15), the corporation's tax base is determined. The tax base is defined in 32 V.S.A. § 5811(18) as "the taxable income of the taxpayer for that taxable year under the laws of the United States, excluding income which under the laws of the United States is exempt from taxation by the states." The income items here disputed are not so exempt. The statute applies the misleading term "Vermont net income" to the income base against which the tax is assessed. The term might seem to indicate that the tax base is composed only of income allocable to business activities within the state, when in fact the term refers to a corporation's total net income before any allocation.

The allocation is a distinct step in the process of determining the corporation's tax liability to Vermont. 32 V.S.A. § 5833(a) establishes a procedure for apportioning the net income of a corporation engaging in activity both within and without the state to allocate to Vermont an equitable portion of that income upon which to lay its tax. The computation mandated by the statute seeks to determine the fraction of a corporation's net income derived from its Vermont business activity and utilizes a three factor formula. The value of all of the corporation's Vermont real and tangible property is expressed as a percentage of the value of the corporation's real and tangible property wherever located. The same process is repeated for Vermont payroll and sales. The arithmetic average of these percentages is then determined, yielding an apportionment factor. This apportionment factor multiplied by the corporation's total net income determines the apportioned tax base. It is upon this apportioned net income reflecting net income allocable to business activity within Vermont's borders that Vermont assesses the tax in question.

Appendix C

Mobil is a New York corporation engaged in interstate and foreign commerce. In each of the years in question, Mobil received a large portion of its taxable income in the form of dividends from foreign subsidiary corporations and from domestic subsidiary and non-subsidiary corporations. Also, in each relevant year, Mobil received a small percentage of its income in the form of interest. These two sources of income will be referred to hereinafter as investment income. All other taxable income will be referred to hereinafter as operating income.

Mobil does not claim that it was not a taxable corporation during the years in question, nor does Mobil argue that the apportionment formula resulted in too great a percentage of its tax base being subject to taxation in this state. Rather, Mobil objects to its investment income being included in its Vermont tax base at all. Mobil filed tax returns during each of the years in question, determining its tax base by applying the apportionment factor, reckoned according to the statute, to operating income only. That is, in determining its "Vermont net income" for each year, Mobil took its net income for federal income tax purposes and reduced this figure by amounts representing dividend and interest income. This is not authorized by law, and upon audit the Vermont Department of Taxes added the amounts back in and assessed deficiencies.

Mobil appealed the deficiencies to the Commissioner under the provisions of 32 V.S.A. § 5833(b). A hearing was held at which time Mobil asserted that the assessments violated the terms of the tax statute, 32 V.S.A. § 5833, the Due Process Clause of the Fourteenth Amendment, and the Interstate and Foreign Commerce Clause of Article I, Section 8 of the United States Constitution. The Commissioner

rejected all grounds of invalidity asserted and affirmed the action of the Department of Taxes.

Upon appeal, the superior court reversed on the sole ground that the tax as applied violated the prohibition against multiple taxation contained in the Commerce Clause. As the superior court correctly noted in its order, the legal questions concerning apportionment and due process had already been answered adversely to Mobil's contentions by recent decisions of this Court. *In re Goodyear Tire and Rubber Co.*, 133 Vt. 132, 335 A.2d 310 (1975); *F.W. Woolworth Co.* v. *Commissioner of Taxes*, 133 Vt. 93, 328 A.2d 402 (1974); *F.W. Woolworth Co.* v. *Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972); *Gulf Oil Corp.* v. *Morrison*, 120 Vt. 324, 141 A.2d 671 (1958).

The single question presented here is: Does Vermont's application of its apportioned net income tax to the investment income in issue constitute multiple taxation prohibited by the Commerce Clause?

Mobil's argument that Vermont's tax would impose an unconstitutional burden on interstate commerce involves a number of propositions. The first is that taxes subjecting interstate businesses to a risk of multiple taxation not borne by intrastate business violate the Commerce Clause. The next is that the test of multiple taxation is the power of other jurisdictions to tax rather than the exercise of that power. The last is that the state of a corporation's commercial domicile, in Mobil's case New York, has the constitutional power to tax its corporation's dividend and interest income without apportionment. Mobil argues that if New York has the authority to tax all of Mobil's investment income, there is a risk that it will do so. If Vermont's tax upon a portion of the same income is sustained, there then will be a risk of multiple taxation. If the mere existence of

the power is the constitutional test, then an impermissible burden would be shown by establishing New York's right to tax without apportionment. There is no allegation that New York presently taxes or intends to tax this investment income on an unapportioned basis, and so, no double taxation in fact is alleged. Mobil asks us to hold that the possibility that New York may so tax prevents Vermont and every other state from laying even a properly apportioned tax upon this investment income.

The burden is upon the taxpayer to demonstrate a risk of multiple taxation. *Standard Pressed Steel Co.* v. *Washington Revenue Department*, 419 U.S. 560, 563 (1975); *General Motors Corp.* v. *Washington*, 377 U.S. 436, 449 (1964).

Mobil in the case at bar has not established that its commercial domicile can tax the investment income of its domiciliary corporation without apportionment. Mobil claims that this proposition is "well established," but only cites four cases in support of its claim. *Chestnut Securities Co.* v. *Oklahoma Tax Commission*, 125 F.2d 571 (10th Cir. 1942), *cert. denied*, 316 U.S. 668 (1942); *Pacific Telephone and Telegraph Co.* v. *Franchise Tax Board*, 7 Cal.3d 544, 498 P.2d 1030, 102 Cal. Rptr. 782 (1972); *Southern Pacific Co.* v. *McColgan*, 68 Cal.App.2d 48, 156 P.2d 81 (1945); *United Gas Corp.* v. *Fontenot*, 241 La. 488, 129 So.2d 748 (1961). Two of these four were decided more than thirty years ago, when apportionment was not looked upon as favorably as it is today. All of the cases construed statutes very different from the apportioned net income tax here in issue. Only the *United Gas* opinion mentioned the Commerce Clause. The Louisiana Supreme Court there held only that the commercial domicile could tax the income from its corporation's intangibles "unless it is established by the evidence [that] such taxation does, in fact, place an

undue burden on interstate commerce." *United Gas Corp.* v. *Fontenot, supra,* 241 La. at 510, 129 So.2d at 756. Whether or not an undue burden upon interstate commerce exists, is, of course, the precise point in issue in this case, and on this point the *United Gas* case is no authority. Congress or the United States Supreme Court may ultimately have to decide on the power of the states to tax on such a basis, but neither has done so yet.

We do not decide this issue in the case at bar since Mobil has failed to establish on the record that New York has the power to tax investment income without apportionment, and hence no risk of multiple taxation is here shown. A number of recent decisions of the United States Supreme Court imply that the issue would be decided by requiring that taxation of investment income of corporations engaged in interstate commerce be on an apportioned basis, rather than by permitting the commercial domicile to tax such income to the exclusion of all other jurisdictions. *Moorman Manufacturing Co.* v. *Bair,* —— U.S. ——, 98 S.Ct. 2340 (1978); *Washington Revenue Department* v. *Washington Stevedoring Companies,* —— U.S. ——, 98 S.Ct. 1388 (1978); *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959).

The United States Supreme Court at one time took the view that the Commerce Clause creates an area of free trade around interstate commerce such that the states cannot tax such commerce at all. *Freeman* v. *Hewitt,* 329 U.S. 249 (1946). But this doctrine had always been subject to exceptions. One line of cases drew a distinction between indirect taxation of interstate commerce through taxation of local incidents of that commerce and direct taxation of interstate commerce itself, only the latter being impermissible. Although it was recognized that the most effective

way to safeguard the policies embodied in the Commerce Clause would be to prohibit all burdens on interstate commerce, it was also realized that all interstate commerce was carried on within the several states, imposing burdens on the states for which they should be compensated. *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250 (1937) states:

> It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the costs of doing the business. 'Even interstate business must pay its way.' [Citations omitted].

In recent times, the free trade view has been subject to dramatic erosion. As the revenue needs of the states were recognized to be both legitimate and large, more and more incidents of interstate commerce were accepted by the court as local and hence taxable without offending the Commerce Clause. In 1959, the Supreme Court directly held that net income from interstate operations of foreign corporations may be subjected to state taxation on an apportioned basis. *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959). More recently the Court has permitted a direct tax on the privilege of conducting interstate business. *Washington Revenue Department* v. *Association of Washington Stevedoring Companies,* —— U.S. ——, 98 S.Ct. 1388 (1978); *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977).

When the Commerce Clause was interpreted to permit taxation of only local incidents of interstate commerce, the danger of multiple taxation was handled within that doctrine. A state could only reach monies generated by activity which bore a special relation to the taxing state. No other

state could tax the same monies because the necessary special relation was lacking. As the states began laying broad taxes on gross receipts not tied to a geographical area or taxes on net income, the Court increasingly sanctioned the use of apportionment formulas to insure that extra-territorial values were not taxed and to guard against multiple taxation. If a jurisdiction is taxing according to the amount of business activity within its borders, that is, if the tax is fairly apportioned, there can be no multiple taxation. *Northwestern Portland Cement Co.* v. *Minnesota, supra,* 358 U.S. at 462. Many states employ different formulas to arrive at their apportioned shares. Some overlap, and therefore multiple taxation may result. This threat is inherent in any system where state apportionment formulas are nonuniform. But in *Moormon Manufacturing Co.* v. *Blair,* —— U.S. ——, 98 S.Ct. 2340 (1978), it was held that a state does not offend the Commerce Clause by having an apportionment formula different from that of its neighbors. See *State Taxation Under the Commerce Clause: An Historical Perspective,* 29 Vand. L. Rev. 335, 347 (1976) by Jerome R. Hellerstein.

In *Washington Stevedoring, supra,* the Court explicitly stated that it was engaging in a balancing analysis in determining Commerce Clause disputes, weighing the burden imposed on interstate commerce by a given tax measure against the state's "significant interest in exacting from interstate commerce its fair share of the cost of state government."

> All tax burdens do not impermissibly impede interstate commerce. The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity.

Washington Stevedoring, supra, —— U.S. at ——, 98 S.Ct. at 1398 (1978).

An attempt on the part of New York to tax investment income without apportionment would tip the balance by subjecting to taxation more than New York's just share. *Washington Stevedoring* made it clear that apportionment was not simply a limiting device to prevent duplicative taxation. Apportionment should operate in such a way that each state the commerce touches will be allocated a proportion of an entity's tax base sufficient to yield a fair contribution toward the cost of running state government. What is a fair contribution will depend upon the benefits conferred upon the entity and the costs imposed by it upon the state by reason of its carrying on business within the state. See *General Motors Corp.* v. *Washington, supra,* 377 U.S. at 441. Vermont has the necessary nexus with Mobil and provides sufficient benefits to be able to lay an apportioned tax on Mobil's investment income along with its operating income. *F.W. Woolworth Co.* v. *Commissioner of Taxes,* 130 Vt. 544, 298 A.2d 839 (1972).

In a conflict between Vermont's apportioned tax on Mobil's investment income and an attempt on New York's part to tax that same income without apportionment, New York might very well have to yield. *Johns-Manville Products Corp.* v. *Commissioner of Revenue Administration,* 115 N.H. 428, 430-31, 343 A.2d 221, 223 (1975); *appeal dismissed for want of a substantial federal question,* 423 U.S. 1069 (1976). Mobil has not sustained its burden of showing that the Commerce Clause was violated by Vermont's properly apportioned income tax.

There are practical considerations that reinforce this conclusion. Mobil receives by far the majority of its taxable income in the form of investment income here sought

to be insulated from taxation by all but one state. The record shows that in 1971 the federal taxable dividends of Mobil made up 92% of its federal taxable income, while in 1972 they equalled 125% of taxable income. The amount in excess of 100% in the latter year was offset by losses and deductions allowed in computing Mobil's federal income tax for that year.

If the investment income was not includable in the Vermont tax base, in 1971, Mobil would have to pay a tax on Vermont's apportioned share of 8% of its taxable income, while in 1972, Mobil would only owe a total of $25.00, the minimum tax. We have already decided that corporations engaged in business within the state receive protections and derive benefits according to the entire income of the corporation. *F.W. Woolworth Company* v. *Commissioner of Taxes, supra,* 130 Vt. at 549, 298 A.2d at 841 (1972). If Mobil's Commerce Clause argument prevailed, Mobil and similar corporations could effectively avoid taxation of the majority of their taxable income if the commercial domicile for any reason declined to tax to the full measure of its ability. The states would be frustrated in their attempts to recoup the costs imposed upon them by foreign corporations merely because interstate commerce was being done. This, in our view, would be a perverse use of the Commerce Clause.

The recent decisions of the Supreme Court, which recognize the revenue needs of the states and seek to put Commerce Clause jurisprudence on a practical footing, require no such result. The Court has said repeatedly that where a state tax is fairly apportioned, not discriminatory, related to state services provided, and where the entity taxed has a substantial nexus to the taxing state, the Court will not void the tax on Commerce Clause grounds on an argument that

is an abstraction or is based on mere speculation. That is, where the tax is of a type that is not inherently burdensome, the Court is requiring proof in the record of multiple taxation and not merely the argument that such hypothetically could occur. *Moorman Manufacturing Co.* v. *Bair,* —— U.S. ——, ——, 98 S.Ct. 2340, 2346 (1978); *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 278 (1977); *General Motors Corp.* v. *Washington,* 377 U.S. 436, 449 (1964); *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 462-63 (1959).

Decree of the Washington Superior Court is reversed; cause remanded, and by that court to be further remanded to the Commissioner of Taxes for action under 32 V.S.A. § 5833 and a reassessment of Mobil Oil Corporation's income taxes for the years 1970-1972, inclusive.

FOR THE COURT:

/s/ FRANKLIN S. BILLINGS, JR.
Associate Justice

Appendix C

SUPREME COURT

FORM No. 1

ENTRY ORDER

SUPREME COURT DOCKET No. 160-77
June Term, 1978.

VT. SUPREME COURT
FILED IN CLERK'S OFFICE

NOV 9—1978

APPEALED FROM:

Washington Superior Court

DOCKET No. .....

COMMISSIONER OF TAXES

v.

MOBIL OIL CORPORATION

In the above entitled cause the Clerk will enter:

Decree of the Washington Superior Court is reversed; cause remanded, and by that court to be further remanded to the Commissioner of Taxes for action under 32 V.S.A. § 5833 and a reassessment of Mobil Oil Corporation's income taxes for the years 1970-1972, inclusive.

Appendix C

FOR THE COURT:

/s/ FRANKLIN S. BILLINGS, JR.
FRANKLIN S. BILLINGS, JR.
Associate Justice
Concurring

/s/ ALBERT W. BARNEY
ALBERT W. BARNEY
Chief Justice

/s/ RUDOLPH J. DALEY
RUDOLPH J. DALEY
Associate Justice

/s/ ROBERT W. LARROW
ROBERT W. LARROW
Associate Justice

/s/ WILLIAM C. HILL
WILLIAM C. HILL
Associate Justice

Appendix D

(Filed January 19, 1979)

WASHINGTON COUNTY SUPERIOR COURT

Josephine A. Alexander, *Clerk*

IN THE WASHINGTON SUPERIOR COURT
OF THE STATE OF VERMONT

Docket No. C-13074 Wnm

MOBIL OIL CORPORATION

v.

COMMISSIONER OF TAXES

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

Notice is given that Mobil Oil Corporation hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Vermont, holding that the Vermont income tax may be applied to Mobil Oil Corporation's dividend income derived from earnings outside the United States, entered in this cause on November 9, 1978, reversing the decision of the Washington Superior Court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Appendix D

DATED: New York, New York
January 17, 1979

/s/ JEROME R. HELLERSTEIN
Jerome R. Hellerstein
80 Pine Street
New York, New York 10005
(212) 344-2040

/s/ JOHN DWIGHT EVANS, JR.
John Dwight Evans, Jr.
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017
(212) 883-4965
Attorneys for
Mobil Oil Corporation

Both of the undersigned are members of the Bar of the Supreme Court of the United States and hereby certify that on this 17th day of January 1979, three copies of the Notice of Appeal to the Supreme Court of the United States were mailed, with airmail postage prepaid to:

M. Jerome Diamond, Attorney General
Edwin Hobson, Assistant Attorney General
Harriet King, Commissioner of Taxes

at their offices at:

Pavilion Office Building
109 State Street
Montpelier, Vermont 05602

We further certify that all parties required to be served have been served.

Appendix D

Dated: New York, New York
January 17, 1979

/s/ JEROME R. HELLERSTEIN
Jerome R. Hellerstein
80 Pine Street
New York, New York 10005
(212) 344-2040

/s/ JOHN DWIGHT EVANS, JR.
John Dwight Evans, Jr.
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017
(212) 883-4965
Attorneys for
Mobil Oil Corporation

Appendix E

STATUTES

Vermont Statutes Annotated, Title 32:

Section 5811 (18). "Vermont net income" means, for any taxable year and for any corporate taxpayer, the taxable income of the taxpayer for that taxable year under the laws of the United States, excluding income which under the laws of the United States is exempt from taxation by the states. However, "Vermont net income" shall not include the "gross-up dividends" required by the federal Internal Revenue Code to be taken into taxable income in connection with the taxpayer's election of the foreign tax credit. In the case of an "electing small business corporation" ("Subchapter S Corporation") under the laws of the United States, "Vermont net income" shall include only the taxable income of the corporation which is distributed to, or is undistributed to but allocable under the laws of the United States to, shareholders during the time while they are not residents of the state of Vermont. (Am. L. 1971, A. 73.)

. . .

Section 5833. Allocation and apportionment of income—(a) If the income of a taxable corporation is derived from any trade, business, or activity conducted entirely within this state, the Vermont net income of the corporation shall be allocated to this state in full. If the income of a taxable corporation is derived from any trade, business or activity conducted both within and without this state, the amount of the corporation's Vermont net income which shall be apportioned to this state, so as to allocate to this state a fair and equitable portion of that income, shall be determined by multiplying that Vermont net income by the arithmetic average of the following factors:

Appendix E

(1) The average of the value of all the real and tangible property within this state (A) at the beginning of the taxable year and (B) at the end of the taxable year, (but the commissioner may require the use of the average of such value on the fifteenth or other day of each month, in cases where he determines that such computation is necessary to more accurately reflect the average value of property within Vermont during the taxable year), expressed as a percentage of all such property both within and without this state; (Am. L. 1971, c.73.)

(2) The total wages, salaries, and other personal service compensation paid during the taxable year to employees within this state, expressed as a percentage of all such compensation paid whether within or without this state.

(3) The gross sales, or charges for services performed, within this state, expressed as a percentage of such sales or charges within or without this state.

(b) If the application of the provisions of this section does not fairly represent the extent of the business activities of a corporation within this state, the corporation may petition for, or the Commissioner may require, with respect to all or any part of the corporation's business activity, if reasonable: (1) Separate accounting; (2) The exclusion or modification of any or all of the factors; (3) The inclusion of one or more additional factors which will fairly represent the corporation's business activity in this state; or (4) The employment of any other method to effectuate an equitable allocation and apportionment of the corporation's income. (Am. L. 1971, A. 73.)

Appendix F

ALLOCATION OR APPORTIONMENT OF DIVIDENDS INCLUDED IN THE TAX BASE*

State[1]	All Taxable Dividends Allocated to Commercial Domicile	Non-Business Dividends Allocated to Commercial Domicile and Business Dividends Apportioned	All Taxable Dividends Apportioned
Alabama		X	
Alaska		X	
Arizona	X		

* This table includes only jurisdictions which include foreign source dividends, in part or in whole, in the tax base. Georgia, Florida and Ohio have been omitted because foreign source dividends are not taxable (Ga. Code §92-3102, CCH 10-512, 11-512), or they are taxable only if the payor transacts a substantial portion of its business, or has a substantial portion of its assets, in the United States (Fla. Stat. §220.13, CCH 10-310), or has physical assets located in the State (Ohio Rev. Code Ann. §5733, CCH 10-309, 336, 378, 11-425).

1. Ala. Code Tit. 40, §40-18-34, CCH 10-535, 15-090; Alaska Stat. §§43.19.010, 43.20.065. CCH 12-417, 418; Ariz. Rev. Stat. §43-135(g), CCH 12-405; Ark Stat. Ann. §§84-2055(a), 2058, 2061, 2063, CCH 11-537, 572; Cal. Rev. & Tax. Code, §25126, CCH 12-428; Colo. Rev. Stat. §24-60-1301, CCH 12-538; Del. Code Tit. 30, §1903(b)(6), CCH 10-840; D.C. Code §47-1580(a), CCH 12-405, 413; Haw. Rev. Stat. §§235-22, 27, 29, CCH 12-530, 540; Idaho Code §63-3027(g), (i), CCH 12-490, 510; Ill. Rev. Stat. Ch. 20, §301, 304, CCH 90-907, 916; Ind. Code Ann. §6-3-2-2, CCH 12-405, 415, 448; Kan. Stat. §§79-3274, 3277, 3279, CCH 12-478, 490; La. Rev. Stat. Ann. §243, CCH 12-411; Me. Rev. Stat. Tit. 36, §§5211(6), (8), CCH 12-460, 465; Md. Ann. Code Art. 81, §316(c), CCH 12-410, 420; Mass. Gen. Laws Ann. Ch. 63, §38(a)(1), (c) CCH 10-324, 330; Minn. Stat. §290.17, CCH 12-407; Miss. Code Ann. §27-7-23(1)(a); Miss. Inc. Tax Reg. §1.27-7-23(1), CCH 12-405, 407, 435; Mont. Rev. Codes Ann. §84-1503, CCH 11-501(c), (f), (h); Neb. Rev. Stat. §77-2735(4), 2741, 2743, CCH 12-425, 445, 455; N.H. Rev. Stat. Ann. §77-A:3, CCH 15-350, 355; N.J. Rev. Stat. §54:10A-6, CCH 5-805, 810; N.M. Stat. Ann. §§72-15A-20, 23, CCH 12-425, 455, 465; N.C. Gen. Stat. §105-130.4(c), (f), (i), CCH 10-805, 820; N.D. Cent. Code §57-38.1, CCH 12-454, 460, 464; Okla. Stat. Tit. 68, §2358A, CCH

Appendix F

State	All Taxable Dividends Allocated to Commercial Domicile	Non-Business Dividends Allocated to Commercial Domicile and Business Dividends Apportioned	All Taxable Dividends Apportioned
Arkansas		X	
California	X		
Colorado		X	
Delaware			X
District of Columbia		X	
Hawaii		X	
Idaho		X	
Illinois		X	
Indiana		X	
Kansas		X	
Louisiana	X		
Maine		X	
Maryland			X
Massachusetts			X
Minnesota	X		
Mississippi	X		
Montana		X	
Nebraska		X	
New Hampshire			X
New Jersey			X

12-425; Or. Rev. Stat. §314.625, 640, 650, CCH 12-414, 418, 422; R.I. Gen. Laws §44-11-14, CCH 10-810; S.C. Code §12-7-1120, CCH 12-435; Tenn. Code Ann. §67-2709, 2712, 2714, CCH 12-419, 425, 429; Utah Code Ann. §59-13-81, 84, 86, CCH 11-515, 530, 540; Vt. Stat. Ann. Tit. 32, §5833(a), CCH 12-410; Wis. Stat. Ann. §71.07(1m)(2), CCH 12-404(a), 409. All CCH references are to the relevant paragraphs in the Commerce Clearing House, Inc. State Tax Reporter Service.

Appendix F

State	All Taxable Dividends Allocated to Commercial Domicile	Non-Business Dividends Allocated to Commercial Domicile and Business Dividends Apportioned	All Taxable Dividends Apportioned
New Mexico		X	
North Carolina		X	
North Dakota		X	
Oklahoma	X		
Oregon		X	
Rhode Island			X
South Carolina	X		
Tennessee		X	
Utah		X	
Vermont			X
Wisconsin			X
Total[2]	7	19	8

2. Four States that tax foreign source dividends have been omitted from the table because their methods of allocation or apportionment do not fit into the scheme used by most States.

Connecticut: Allocates dividends from subsidiaries by reference to the ratio of the payor's business done in the State; non-subsidiary dividends are apportioned if they constitute an integral part of the recipient's regular business operations (Conn. Gen. Stat. §12-218, CCH 10-815, 825).

Iowa: There appears to be a conflict between the statute and the rules as to the extent to which dividends are allocated or apportioned (Iowa Code §422.33, CCH 12-520; Iowa Rule 54.2(1), CCH 12-522).

New York: Includes in the tax base only non-subsidiary dividends (to the extent of 50%), which it allocates in the ratio of the payor's New York apportionment percentages (N.Y. Tax Law §210, CCH 5-829—841, 9-581).

Virginia: Dividends of non-subsidiaries are allocated to the State if it is the recipient's commercial domicile; dividends paid by subsidiaries are apportioned (Va. Code §58-151.040, CCH 12-445).

Supreme Court, U. S.
FILED
JUN 28 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—v.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

FILED FEBRUARY 2, 1979
PROBABLE JURISDICTION NOTED MAY 14, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—v.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

INDEX TO APPENDIX

PAGE

Chronological List of Relevant Docket Entries A1

Transcript of Hearing held November 8, 1973 before Commissioner of Taxes, filed June 27, 1974 ..... A3

Exhibit No. 1—Vermont Corporate Income Tax Return for 1970, filed June 27, 1974 ..... A32

Exhibit No. 2—Vermont Corporate Income Tax Return for 1971, filed June 27, 1974 ..... A46

Exhibit No. 3—Vermont Corporate Income Tax Return for 1972, filed June 27, 1974 ..... A60

PAGE

Exhibit No. 8—Taxpayer's Exhibit of Source of Dividend Income Schedule, filed June 27, 1974 ..... A74

Exhibit No. 17—Taxpayer's unsigned and unexecuted proposed Stipulation of Facts, filed June 27, 1974 .... A79

The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Jurisdictional Statement:

Determination of Appeal by the Commissioner of Taxes of Vermont 1a

Superior Court Order and Final Order 14a

Vermont Supreme Court Opinion and Order 19a

Chronological List of Relevant Docket Entries

WASHINGTON SUPERIOR COURT

WASHINGTON COUNTY, STATE OF VERMONT

Docket No. C 13-74 Wnm

MOBIL OIL CORPORATION

vs.

COMMISSIONER OF TAXES

DATE	PROCEEDINGS
5–20–74	Appellant Mobil Oil Corporation's Notice of Appeal from determination by Commissioner of Taxes filed.
6–27–74	Record of Tax Department filed.
3– 5–75	Stipulation for continuance until Fall Term 1975 filed.
6– 9–75	Brief for Appellant filed.
8– 4–75	Brief for Appellee Commissioner of Taxes filed.
9–19–75	Reply brief for Appellant filed.
1– 7–77	Order in favor of Appellant filed.
1–31–77	Amended Order signed by Morrissey, J.

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
6– 8–77	Stipulation for Final Order filed.
6–10–77	Final Order in favor of Appellant filed.
6–14–77	Notice of Appeal filed; cause certified to Vermont Supreme Court.
11–10–78	Vermont Supreme Court Entry Order of November 9, 1978 reversing decree of Superior Court filed.
1–19–79	Notice of Appeal to the Supreme Court of the United States filed.

Transcript of Hearing Held November 8, 1973
Before Commissioner of Taxes

[Record of Tax Department—Item 10 Reprinted in Supplemental Printed Case pp. 1-29]

WASHINGTON SUPERIOR COURT

WASHINGTON COUNTY, STATE OF VERMONT

Docket No. C 13-74 Wnm

[TITLE OMITTED IN PRINTING]

STATE OF VERMONT

DEPARTMENT OF TAXES

BEFORE COMMISSIONER OF TAXES

Mobil Oil Corporation
Income Taxes, 1970, 1971, 1972
Hearing on Protest

November 8, 1973
10:00 AM.

Lathrop: This is a hearing on an appeal by Mobil Oil Corporation, taken pursuant to 32 V.S.A. § 5883, which is the section under which appeals to assessments are taken, and 32 V.S.A. § 5833(b), which is the section under which corporate income taxpayers can petition for modification of the 3-factor apportionment formula. The date is November 8, 1973, the time is shortly after 10:00 in the a.m. For the record, let's introduce ourselves around the table beginning on my right and work around this way.

Pfalzer. Otto J. Pfalzer, Senior Tax Advisor, Mobil Oil Corporation.

Hellerstein: Jerome Hellerstein, Outside Tax Counsel for Mobil Oil Corporation.

Evans: John Dwight Evans, Tax Counsel, Mobil Oil Corporation.

Lathrop: Robert Lathrop, Commissioner of Taxes.

Kendall: James Kendall, Director of Audits Vermont Dept. of Taxes.

Goldkamp: Ed Goldkamp, Deputy Commissioner of Taxes.

Lathrop: Now, to the extent any factual statements are made, I want to put you under oath, being a duly qualified notary for the State. Will you raise your right hands and I'll do that. "Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?"

Others: I do.

Lathrop: Mr. Kendall, would you summarize for us the situation as you see it from the Vermont Dept. of Taxes' point of view.

Kendall: Yes. The Mobil Oil Corporation on its 1972 Vermont Corporate Income Tax Return reduced the Federal taxable income, specifically line 30 of the Federal Form 1120, which was $232,825,728.27 by amounts representing non-apportionable income in the amounts of some $280,000,000 in dividends—I'm sorry—non-apportionable income as a heading, dividends of $280,000,000 some odd thousand; interest of $3,900,000; and foreign taxes of $38,260,000 some odd hundreds. The departmental auditor adjusted the taxable income and restored to the Federal taxable income all of these reductions with the exception of the interest on government obligations, which is allowable, and the "gross-up" only of the foreign dividends. We were able to ascertain these figures from the schedules supporting the Vermont return and included in the Federal return. So, that we restored the income to its original amount, with

the allowable deductions, and assessed additional tax on that basis of $25,359.69, "with interest of $443.80," for a total of $25,803.49, adjusted and then apportioned it by the proper Vermont apportionment factor as indicated on the return. The corporation entered a timely appeal to this adjustment under date of August 22, 1973. The taxpayer requested permission to submit additional documents and stipulations in the matter and these have been submitted and have been reviewed, I understand, by counsel for the Department. The hearing then was set for this date.

Lathrop: Now, let me see if I can—I'm sure this will come out in the discussion, but I want to pinpoint a few things. What kind of dividends and what kind of interest are being deducted against the line 30 figure?

Hellerstein: Excuse me one moment, if I may, Mr. Commissioner. Would it be appropriate at this point, or do you intend at a later point, to refer to the fact that we are also involved with years 1970 and 1971?

Lathrop: I want to get to that, too.

Hellerstein: Very good.

Lathrop: Yes, I know you raised that issue. What I want to get on the record is whether we are talking about dividends from foreign subsidiaries or dividends from every place. I have a feeling it's the latter.

Kendall: In this case they were total dividends—foreign and domestic. Correct me if I am wrong here.

Evans: Yes, that's right.

Lathrop: Not just from subsidiaries?

Kendall: Correct.

Lathrop: The whole works.

Kendall: Right.

Pfalzer: Dividends from subsidiaries and non-subsidiaries.

Kendall: And interest from all sources.

Pfalzer: On the interest, it's a specific non-operating type interest that was excluded from the apportionable tax base.

Lathrop: Why don't we get into that in a minute. Now, I think that would be the best way to do it.

Kendall: And the third item is foreign taxes.

Lathrop: Since Mr. Hellerstein mentioned it, in one of these documents there's a reference to 1970 and 1971. Presumably we've been through the same procedure. That is we have assessed the tax and presumably you people either paid under protest or actually petitioned for a hearing. I don't know what the circumstances are.

Hellerstein: The issues for 1970 and 1971 are basically the same as for 1972, with one difference. In the year 1970 gross-up is included, so-called gross-up. A protest was filed as to both of those years. There has never been a hearing on either of the years 1970 or 1971. We would propose in this hearing to include all three years in the one hearing since the issues with the one exception are all the same.

Kendall: Yes. I should stipulate, sir, we did receive timely appeals for both 1970 and 1971, and a hearing has not been held in connection with those two years.

Lathrop: I assume that was because of the *Woolworth* case . . .

Kendall: Right. That is correct.

Lathrop: . . . which is still being litigated. We can't agree on what the Vermont Supreme Court said in *Woolworth*. Okay, so we are covering all three years here. Identical except for gross-up?

Hellerstein: Yes.

Lathrop: The problem of gross-up is in 1970 only; it is not a problem for 1971 and 1972.

Hellerstein: That is right.

Lathrop: Okay. I think, Jim, you probably covered what you need to so Mobil wants to go ahead. Which one of the representatives would you like to have speak and respondent to the Department's position that these items be added back into income?

Evans: My name is John Dwight Evans. I'm Tax Counsel for Mobil. I would like to state at this time that Mobil Oil Corporation submitted several weeks ago a proposed stipulation of facts to the State of Vermont, which we believe states the facts in this matter and which we propose to stipulate with the State. Now, I want to state here that there are also exhibits to this stipulation, some 16 documentary exhibits. We have, since submitting the stipulation, made a couple of changes which I have brought with me today and which we feel to be of some importance to be included in the stipulation. I would like to, at this time, ask whether the state has reviewed this stipulation and whether the state is agreeable to entering into this stipulation because, if so, I think that we can—for the record the facts will be all contained in the stipulation and the exhibits and I don't believe, that unless you have some questions and facts, that you want to develop, that we have any further facts that we would want to put into the record. Is that correct, Jerry? Joe?

Hellerstein: That's correct.

Lathrop: Okay, now. In that respect, Ed, I think you had some problems with . . .

Goldkamp: Yes, may I take a quick look at it.

Lathrop: It's right here.

Goldkamp: I think there are some that we cannot agree to and some we don't think are particularly germane to the issue. I think the first one—well, the first one I had problems with—my file on it was no. 4 where we didn't have a protest, but I understand now that has been corrected, there has been an appeal made for those years. Is that correct?

Kendall: Yes. That is correct.

Goldkamp: No. 5a, that Mobil reported on a Vermont return its income was shown on line 30 and deducted therefrom dividends received by it. I don't believe that's absolutely correct. I think you backed out all the other things from your line 30 income and then reported that on your Vermont income.

Evans: Well, then in other words you rather say that instead of deducted?

Goldkamp: Well, I don't want to agree that you reported on your Vermont return your line 30 U.S. Corporate Income Tax Return amounts. I don't think that happened.

Evans: No. I don't . . . Joe, do you have the . . .

Hellerstein: I think what Mr. Goldkamp is referring to here is that we showed on an attachment to the return itself line 30 and then backed out what we considered nonapportionable income and reported that revised sum on the face of the return on line 1.

Evans: I'm certainly agreeable to describing it that way. That's really what we were trying to say. We could easily say here in respect to the calendar year Mobil reported on its Vermont return income as shown on line 30 of U.S. Corporation Income Tax Return with the following

items backed out or something. We agree with you what you are saying there. It's just a matter of describing it I guess accurately.

Kendall: "Or reduced by the following items."

Evans: Reduced by the following items—I guess that would . . . Respect to calendar year, Mobil reported on its Vermont return income as shown on line 30 of U.S. Corporate tax return reduced by the following items, and then we could just number them: 1. dividends received either United States or foreign sources in such and such amount; 2. interests from United States and foreign sources; and 3. Interest from U.S. Government obligations and 4. foreign income taxes in the amount of . . .

Hellerstein: May I make a correction?

Evans: Right.

Hellerstein: I think you should strike the interest from U.S. Government obligations because that is item 2 on the return. So to arrive at item 1 . . .

Goldkamp: There is another copy of this stipulation in my folder.

Hellerstein: . . . to arrive at item 1 you would not be reducing line 30 of the Federal Income Tax by the . . .

Evans: What you are saying is the interest from U.S. Government obligations could be just stricken out entirely?

Hellerstein: Yes.

Kendall: Yes. Because that comes out on the face of the Vermont return.

Evans: So that would only be three things and the third would be foreign income taxes in the amount of . . .

Kendall: That would be correct.

Hellerstein: Could we do that now and thereby change the stipulation so that we'll have the stipulation as you

want it at this point? Or do you want to wait and see what comes?

Goldkamp: Well, we have a few more to go through on this.

Hellerstein: Fine, fine. You have that down on your copy Dwight so that we can have that before us.

Pfalzer: We would have the same situation for the other returns.

Hellerstein: Right, the same thing.

Evans: Yes, we would make exactly the same changes. On page 4 if I might, Mobil proposes one change in paragraph 8 we propose to add one additional sentence to this effect: Mobil is subject to net income taxes or franchise taxes measured by net income imposed by some 40 other states and the District of Columbia. I have the pages with that change.

Goldkamp: Did you have that somewhere else in here?

Evans: That was in the protest. That's where you read it. It was in the protest.

Kendall: That has been added to this . . .

Evans: That has been added to paragraph 8—new sentence of paragraph 8.

Goldkamp: On no. 11, we don't know about the payment of all dividends received outside of Vermont and we don't know that the dispositions of such dividends were managed and divided outside of Vermont, that's just some of the things we don't know, for sure.

Evans: Well, we can put testimony in in connection with that. That is the fact. We have no office in Vermont. All of these . . . This is a correct statement of facts. I can swear to that from personal knowledge.

Goldkamp: Now, no. 13. I'm just wondering how germane that is to the issue that we are having here. And that goes to . . .

Evans: Fourteen, also.

Goldkamp: Fourteen, also.

Hellerstein: May I comment on the relevancy? One of our contentions is that with respect of the question as to whether the deficiency here assessed complies with the statutory requirement of the amount attributable to Vermont represents the amount fairly and reasonably attributable to activities in Vermont. Our contentions include the following: 1. that Mobil's activities having to do with its operation essentially as a holding company receiving dividends whether from domestic corporations or from foreign corporations have not the slightest connection with the State of Vermont. That, therefore, the inclusion violates the basic statutory provision. Likewise, this ties in with our constitutional arguments that the Due Process Clause is thereby violated, the interstate and Foreign Commerce Clauses are thereby violated, and that fundamentally this is in conflict with the—this inclusion is in conflict with broad federal tax policies with respect to foreign commerce. Finally, this contention, namely as to the dividends in question, their source, their amounts, their magnitude, the earnings base of the dividends all tie in with our petition for variation under 5833. So it seems to us that this allegation, the whole series of paragraphs come to are highly relevant to our positions.

Goldkamp: Is that the same thing for no. 17 and no. 18?

Hellerstein: Precisely. It ties in with . . . This whole series of allegations is designed to show that tc attribute

any part of these dividends to Michigan violates the statute and the constitution and affords a basis for a . . .

Kendall: You meant to say Vermont instead of Michigan, I believe, Mr. Hellerstein.

Hellerstein: Oh, sorry. We have many states involved in similar problems. Forgive me. Vermont, of course.

Goldkamp: And then I guess that would go to 19 also?

Hellerstein: Precisely That's what this whole series of statements is about.

Goldkamp: And 24?

Hellerstein: Right. That is correct.

Goldkamp: That would be 32, Arabian Oil, American Oil Company.

Hellerstein: That's right—28, 29 and 30, 31 and 32. Those are all U.S. non-subsidiary corporations operating abroad outside the United States paying dividends to Mobil Oil Corp.

Goldkamp: I'm going back to the other question on no. 33 about the payment of all interest which is received by Mobil outside of Vermont and Mobil's control, use disposition as managed directly from the offices outside of Vermont. That would go back to the other question . . .

Hellerstein: That is right . . .

Goldkamp: For what it is worth.

Hellerstein: I can say from personal knowledge that is a correct and accurate statement.

Goldkamp: I have, I guess, one other problem. The Attorney General's Office is not all that interested in entering into stipulations. A lot of times at this stage of the proceedings and based on the fact that a lot of this stuff, at least from our records, we can't verify.

Hellerstein: Well, in that connection, since we are under oath, I can testify and I think Mr. Pfalzer can testify also, that we have verified this information, that we can testify that it is true and correct. This is what we have testified to here today. If we want to go through this thing line by line asking questions and answering them, this would be the record that we would submit.

Goldkamp: Well, could we do it this way? Pending we check with the Attorney General's Office and our talk here today using this as the basis and then deciding whether we can or cannot enter into this stipulation afterward on that or are you just here to present facts today?

Hellerstein. No. We are entirely agreeable to your taking this subject to checking and if for any reason you conclude that the stipulation will not be acceptable then presumably and we can't otherwise dispose of the case, presumably we can have another hearing at which we will give the testimony. Does that seem satisfactory?

Lathrop: Well. Or we could accept this as testimony.

Evans: That would be fine.

Hellerstein: That's fine with me.

Lathrop: And not use these as the sole facts and I'll tell you why. If we stipulate, I would not stipulate to this set of facts, obviously, there is no reason why you shouldn't. You've tailored them to your argument and there may be additional facts as we go through this determination that we think are pertinent and I don't want to be bound by the facts that support your argument alone.

Hellerstein: That is perfectly agreeable. In fact, the stipulation I believe says that either party may introduce other and further evidence not inconsistent with the facts here stipulated and by that we mean if you have any fur-

ther facts that you want to put into the record, we are perfectly agreeable. In fact, if anything new came up that we thought was relevant, we would also, so long as it wasn't inconsistent with what we said here, I would want to put it in the record. I think this is satisfactory. We would like to have it stipulated to but if not, we would like to have it submitted into the record as the testimony of Mobil Oil Corporation.

Lathrop: I think that's fair enough. I don't see anything wrong with that. If you swear to it under oath that this is the fact of the case?

Hellerstein: Yes, now in that connection, let me say that I have two other small changes that we propose for page 13 and 14. Let me pass them out here and I'll show you where the changes are. And then what I would like to do is sign them indicating that I have . . . all right, now the changes on page 13, there's been an additional paragraph 33 which reads: the income of each of the corporations referred to in paragraphs 26-32 and if you go back and look at paragraphs 26 to 32, it's referring to the foreign incorporated subsidiaries and non-subsidiaries and the U.S. incorporated non-subsidiaries, we state that substantial— that the income of each of the corporations referred to in those paragraphs was derived through a substantial extent in foreign commerce. That is accurate and true. The other change is on page—excuse me, let me, no, —that's the only change. The other changes are simply renumbering the paragraphs so that the old paragraph 33 became 34 and we had a new paragraph 35 which was old paragraph 34. So the only change on pages 13 and 14 is the new paragraph 33 which I have just referred to and the renumbering of the paragraphs. With that if those changes

are acceptable, I would like to insert these new pages in the stipulation and resign it and date it today and submit it to you and the earlier stipulation would be withdrawn so that we would have . . . Is that acceptable?

Goldkamp: In other words, you want to take out the prior pages and put them in the back with your signature on it and have the that and the new one reshuffled and consists of the stipulations.

Hellerstein: Right, right. Why don't I do that now. That leaves though this question which really isn't any problem of changing paragraphs 5 a, b, and c. I think, maybe, in the interest of time, why don't we just do that by pen: We could make the corrections and I'll initial them and I don't think it's necessary to have the whole thing retyped.

Evans: I don't suppose so. They seem like simple changes.

Goldkamp: How did you have 5 a, b, and c changed? Specifically?

Hellerstein: Well, let's go through 5a and I'll do it in pen here. 5a would read as follows: with respect to calendar year 1970, Mobil reported on its Vermont return its income as shown on line 30 of its U.S. Corporation Income Tax Return reduced by the following items: 1. dividends received by it from the United States and foreign sources in the amount of $174,211,073 (including gross-up) of foreign dividends of $354,859 (paid by foreign subsidiary corporations and foreign and domestic non-subsidiary corporations); 2. interest from United States and foreign sources, other than United States Government obligations, in the amount of $10,520,793; and 3. foreign income taxes in the amount of $12,221,477. The words interest from

U.S. Government obligations in the amount of $2,291,179 being stricken. And then we would do the last sentence of 5a would remain the same. And we would do exactly the same with b and c.

Pfalzer: The last sentence in 5a should be concluded after all the above deductions.

Hellerstein: All right. You are right. So that, right, Joe, the last sentence of 5a would read: on audit the Vermont Department of Taxes disallowed and added to apportionable income all the above deductions. Except interest on U.S. Government obligations that we have taken out already above so we don't need to refer to that again.

Lathrop: How about all the above reductions?

Hellerstein: Reductions, that's all right. Yes, because we don't call them deductions anymore. Right, and b and c would follow the same form.

Lathrop: Now, what do you propose to do? Make these changes in b and c right now, too?

Hellerstein: Yes, I would propose to make these corrections in the interest of time and to save the retyping.

Lathrop: Ed, why don't you make them on your copy and Mr. Evans can sign it. I would really prefer to take this not as a stipulation but as a sworn statement of facts.

Evans: That's fine with us.

Hellerstein: That's fine with us.

Lathrop: It would serve the same purpose. It doesn't lock us into facts that we may consider pertinent later on.

Hellerstein: Mr. Lathrop, there would only be one item that I would suggest we might as well stipulate to which I think you would have no problem with. On page 2, par. 4 Mr. Kendall has already stated that there were timely protests for all three years. But the final sentence of par. 4 requires a stipulation and we would request that it be

stipulated. All contentions made therein, mainly the '72 protests, shall be deemed applicable to the years '70 and '71 as well as the year '72.

Lathrop: I guess they are except for the "gross-up" situation with respect to '70.

Hellerstein: The statement of our contention was a little fuller, somewhat fuller on the '72 stipulation. They are essentially the same problems but we simply want to be in a position of making it perfectly clear that all the contentions made under the '72 protests are intended to apply to '70 and '71.

Lathrop: You could do that. Well, you never did pay the tax. I don't see anything wrong. . . .

Hellerstein: Fine, very good. With that understanding. . . .

Lathrop: You can file this thing for those years anyway. (Voices together—can't understand.)

Hellerstein: All right. With that understanding, then, the recognition of the stipulation is not except for that portion that I have just mentioned at this point at least accepted by the state but this is being introduced as evidence as Mr. Evans' testimony that's my . . .

Evans: Testimony of myself and Mr. Pfalzer on behalf of Mobil Oil Corporation.

Lathrop: Right. You stipulate in paragraph 4.

Evans: Right. Rather than make these corrections in paragraph 5 right now, should we go on into our . . .

Lathrop: That's something we can do after the hearing . . . Now why don't you go ahead and present your legal arguments for our consideration and clear up your testimony incorporated in the proposed stipulation after the hearing.

Hellerstein: That's agreeable. Very well. I should like to present an outline of our legal contentions. First, with respect to the inclusion or adding back to the base of dividends and interest. And our first contention is that action violates the provision of the Vermont Statute 5833 I believe which requires that where a corporation is doing business both within and without the state, that the amount of the tax vis-à-vis apportionment must represent a fair and equitable—those are the statutory terms—portion of the taxpayer's income. Now, obviously this statutory provision is drawn in the light of the well established position of the Supreme Court of the United States that an apportionment formula has got to have at least the one in which the method used, has got to display at a reasonable relationship as the Supreme Court said in *General Motors* v. *Washington*. It's got to have at least a modicum of a relationship to the corporate activities within the state. Now, it is our contention that the statute is here violated and the reason is that there is simply no relationship whatever between Vermont and any of these dividends and interest in question where corporate domicile is outside of the State of Vermont. The dividends are received, spent, controlled, managed outside the state of Vermont. The dividends in question and this is especially true, by the way, with respect to the dividends received from corporations whether they are American corporations or foreign corporations. That is, in terms of where they are organized and from affiliates. These dividends are received to the extent of 99% from underlying income and activities of the subsidiaries and affiliates outside the United States. Now, as I suggested earlier, Mobil is essentially two things: Mobil in the United States is very largely an operating company.

To be sure, it has some subsidiaries. For example, we have a subsidiary that runs a pipeline; but essentially in the United States Mobil directly operates exploration, production, refining, distribution, etc., and we are perfectly willing to pay an appropriate apportioned tax and we would not raise any question about the apportionment with respect to operating income. Now the limitation even on the operating level of what we do in Vermont is very striking. We don't have any wells here. We don't have any refining here. We don't have any manufacturing here. What we do, however, is to include as we have no objection here of including of overall apportionment basis Mobil's income from its operations from its exploration, for production, refining, manufacture, all of which take place outside of the state to the extent of Mobil directly all within the United States, or virtually all. That we have no problem about, but when we come to our operations as a holding company, and as I say virtually all of the dividends which are here in question and indeed the interest in question, the State of Vermont doesn't give us to any extent what is fundamental as a basis for tax. We get no benefits, we get no protection from the State of Vermont, with respect to activities as a holding company. In real substance, therefore, this is a separate independent operation with which the State of Vermont has not the slightest connection. And it is our contention, therefore, the statute is simply violated by the attempt to buy your formula which covers not only our operating functions but covers our functions as a holding company. Now that's essentially our basic contention that the statute is violated.

Our constitutional questions, constitutional positions you are in general, I am sure, quite familiar with and I don't

need to detail those except to tick them off with respect to broadly the problems of interstate commerce of which you've heard a good deal in other cases. Fundamentally, for the reasons that I have indicated it is our contention that the Due Process of Law Clauses are violated. This is extra-territorial taxation because there is simply no relationship between this income which is sought to be taxed and the State of Vermont. For similar reasons, this imposes a burden on interstate commerce. But I do want to take a minute just to refer to what I regard as a very special feature of the case which I think is not present or at least I have generally not seen it argued very extensively in cases over the country, whether it has been here I do not know. And that is first that the Interstate and Foreign Commerce Clauses here are violated. Now, it is of course well settled that the restrictions on state taxation imposed by the Interstate Commerce Clause which 300 or more cases of the Supreme Court have decided that those, of course, apply to foreign commerce. But I would like to suggest that there is a special sensitivity in the court and there is a special need for safeguards and protections vis-à-vis state taxation when we are dealing with foreign commerce other than when we are dealing with domestic commerce. Domestic interstate commerce. Now, let me spell that out. As you well know, one of the key safeguards that the Supreme Court has developed basically since the middle of the 30's I believe, has been the multi-state, has been the multiple taxation doctrine. The substance of which is that and most of these cases, of course, deal with interstate commerce, but the substance of the multi-state, the multiple taxation doctrine is this: that where you've got a tax which if the Supreme Court

sustains with respect to one state, would result in the power of other states to impose similar taxes which would subject inter-state commerce to a burden of cumulative multiple taxation to which intra-state commerce is not subject then such a tax imposes an undue burden on interstate commerce and violates the Commerce Clause. On the other hand, if because the Supreme Court was sitting there and is operating as the final arbitrator for the meaning of the Due Process Clause, which prevents extra-territorial taxation, and if the Interstate or Foreign Commerce Clause—Interstate is the one I want to focus on for the moment before we come to the Foreign Commerce Clause—the reason of the Court's power because it's sitting there and the rules that are established will prevent another state from imposing such a tax then the multiple taxation doctrine permits state A which is before the court to impose such a tax. Now the problem when you get to foreign commerce is and the reason why special safeguards are required when you are dealing with foreign as distinguished from domestic interstate commerce is this: the foreign states and the European countries, Canada, Middle East, what not, are not subject to the Due Process Clause of our Constitution nor are they subject to the Interstate or Foreign Commerce Clause of our Constitution. And so the Supreme Court is not in a position to impose similar restrictions and while there has been very little learning on this because the states just simply haven't tried to reach out in a manner which subjects foreign commerce to this kind of a burden, the Supreme Court has recognized that there is a difference between the safeguards required to be imposed with respect to domestic and foreign commerce for this very reason and that is that the court cannot

prevent these other countries from imposing such taxes. Now, let me indicate concretely why in our view there is a burden of multiple taxation, the risk of multiple taxation and that is all the court has required. Whether the state exercises this power or another county exercises this power is another problem. You can't subject, say the courts again and again, one to a tax where there is a risk that another state having such power will exercise it. Now, look at what happens. Here we are, Mobil Oil Corp., with its commercial domicile, the management of all its subsidiaries, the direction of its subsidiaries and affiliate activities to the extent that it acts as a holding company in New York. Dividends coming up now there's no question but that the foreign countries can and many do—Canada and other European countries—can and do impose taxes on Mobil with respect to the dividends that are derived by Mobil from its subsidiaries or affiliates which earn all their income outside the United States and in foreign commerce. Now those dividends come up here. If you tax those dividends again, and bear in mind you don't allow any foreign tax credit if you tax those dividends again we are inevitably, or if those courts should sustain or if you should sustain the foreign state to tax those dividends as part of the apportionment base which is what the issue here involves, this corporation engaged thus in a broad foreign commerce operation is not only going to be subjected to the risk but the actuality of double taxation. Now look at what happens, the test is are we being subjected to an undue burden, *i.e.*, the risk of multiple taxation, a risk and these are the precise words of the Supreme Court—A risk to which intra-state business is not subject and are we subject to this simply because we are doing foreign business. If you

dealt with a Vermont corporation doing all its business here, there would be only one tax on this corporation. Vermont might impose a tax on the corporation on receipt of dividend but it wouldn't impose a tax twice on this corporation. So that our pitch is, and we think there is a very serious problem here, that I think has not been extensively developed because the problem has not really arisen—that your inclusion or attempt to include these dividends from foreign commerce and 99% of the dividends are from foreign commerce from underlying operations abroad subjects us to a prohibited risk under Foreign Commerce Clause that violates the Constitution. Now, there is a second general line of contention that's related but not quite the same thing as to why we think the Foreign Commerce Clause would be violated by what you propose to do, what has been proposed here. And that is this. It's our contention that the proposed assessment here is in conflict with federal tax policy and that the Vermont proposed tax cannot survive that conflict with federal policy. And I am sure that you are well aware of the fact that within its powers what Congress does is predominant. If there had ever been any question about that under the Commerce clause the New Deal, National Labor Relations Act cases, Wage and Hour cases make perfectly clear the predominance, as the court has said again and again, of Congress. When Congress acts within its powers obviously it prevails. Now, our contention is that this proposed tax by the State of Vermont on these dividends conflicts with well established federal tax policy designed to protect United States based corporations which are engaged directly or through subsidiaries or affiliates in foreign commerce. Now, if you look at the Federal Income Tax Act, what

you've got is this: when Mobil receives a dividend from a corporation, if it's a subsidiary or an affiliate in which it owns at least 10% of the stock—in the first place if that affiliate or subsidiary derived most of its income as a rule 90% from foreign sources which is true with all of these companies we are talking about, then since the dividend is not included in the U.S. income base, Mobil gets the dividend from Canada or let us say from a French company or a German company or what not. The underlying company has paid income taxes. We get, I am sure you are aware of the so-called indirect credit, to the extent a tax was paid on the earnings out of which this dividend comes, Uncle Sam says, "we don't want you to be subject to double taxation, we give you—you have a right to take a full credit against that we are including your dividends all right but we want to give you a full credit for whatever tax the underlying company pays. Second, we will also give you a credit where those countries, as I have mentioned many do, have taxed usually on a withholding basis, have taxed you the recipient corporation, based here in the United States where you have been taxed on the dividend there is a second tax there." Uncle Sam also gives us a direct credit for that. Vermont doesn't do any of these things. No credits of any kind. And I am suggesting that we are thus put in a position where there are three taxes if you should prevail here, which are utterly in conflict with federal tax policy. And we submit that's contrary to the established federal tax policy fully within Congressional power. Now, there's another aspect of this same thing, and that is this. In Vermont Mobil is a foreign corporation. If you look at the way the United States under its tax laws treats foreign corporations, vis a vis.

U.S. foreign corporations, in other words you have a German company let us say that does business here. How do they tax dividends? Well, remember we are a foreign corporation in Vermont. Under the U.S. Income Tax law unless the dividend has its base—if the dividend has its base in earnings, that were created by at least 80% of the gross income of the company paying those dividends, in foreign sources they are not taxed by the U.S. That's foreign source income. And we are suggesting that your treatment of this income to us as Vermont based income violates our federal policy. Now, Mr. Lathrop, Mr. Goldkamp, Mr. Kendall. I'll make it perfectly clear; there's not a great deal of learning on these points and the reason is that the states haven't sought this but we do think there's a serious problem here and we think on these various scores that this attempt on your part to reach out and what is a comparatively new kind of thing, particularly with respect to the expanding operations of foreign enterprises, we think it violates the Foreign Commerce Clause. Now, the basic arguments with respect to the interest essentially tie in with some of the earlier points I made, namely, that the interest has no connection with the State of Vermont. Now we would hope that as a result of our contentions that this deficiency vis-à-vis dividends and interest be set aside. But as the Commissioner stated at the outset in the event you should disagree with those contentions, we have petitioned under § 5833(b) and it is our submission that under the Commissioner's power, and we submit the duty that the exercise of power under § 5833(b) on these facts particularly with the sensitive foreign income involved requires a deletion from the base of the dividends and interest. Or, if you can find some

other method of modifying the formula in a manner which will produce an equitable allocation that we believe that this is an appropriate and as the court has indicated this is a mandatory obligation of the Commissioner for the facts so required, it is an appropriate case for that kind of action. Now that's only a brief outline of our contentions with respect to the interest and dividends. And Mr. Evans is going to pick up the tax deduction problem.

Evans: Joe, could you give me our copy of the Vermont law? Did you bring it with you, please?

Lathrop: Mr. Hellerstein, while we have a second—the court said that the Commissioner would be mandated to modify our use—is that your interpretation of what *Woolworth* said?

Hellerstein: Our interpretation of *Woolworth* is that you were given a mandate to make some equitable modification.

Lathrop: I just want to make sure.

Hellerstein: Yes. That's our contention. And incidentally, there are cases in a number of other states, New Jersey is among them, as I recall it and I believe Michigan is another where the courts have treated these provisions which practically all states have these provisions for equitable modification is mandatory.

Lathrop: If petitioned or petitioned with a reasonable set of facts?

Hellerstein: Obviously, it has to be warranted. There's no—I'm not arguing that—I'm arguing that when taxpayer petitions you must act. I'm simply saying that if the court concludes on its own that this is a case in which the formula and the base that they operate do not produce a fair and equitable result, then as we read the *Woolworth* case, and

as I say there are other cases over the country, then it is the obligation of the Commissioner to exercise his discretion. How he exercises his discretion obviously in the first place is and presumably the manner of exercise of the discretion whether it produces an equitable result would itself I assume as *Woolworth* I gather is seeking an appeal to the court. But where the facts indicate an inequitable result as we think ours does in the light of the stanza of the statute, then as we read *Woolworth* it is the Commissioner's obligation to make some adjustments.

Lathrop: Yes. That's how I read it.

Hellerstein: Yes, I think that's a fair statement.

Lathrop: I did not not act. I did modify. They didn't like what I did so, or the way I did it.

Hellerstein: I guess that wasn't a great surprise. Or, maybe it was.

Lathrop: Well, just for discussion purposes, I thought I followed what the court said. You've read the case. It's on the record in *Woolworth*. I don't know what the Supreme Court will think when they read it, if it gets up there but . . . there was general agreement that it was a confusing opinion in some areas.

Hellerstein: Well, we've had some difficulties . . . In connection with the issue of the reduction of the apportionment by a deduction for foreign taxes I would like to make the following points: As indicated previously, more than 99% of the dividend income here in question is from foreign sources and as the record indicates there are substantial amounts of foreign taxes paid in connection with that income and income of Mobil Oil Corp. from foreign sources. On its federal income tax return Mobil Oil Corp. takes a—for the years here in question, took a credit for

foreign taxes as distinguished from a deduction. However, we believe that under the Vermont law and we also believe that by analogy the Supreme Court of Vermont in the *Woolworth* case indicates that we should be entitled to a deduction for foreign taxes. Particularly if the foreign dividends are included by the State of Vermont and can be included constitutionally by the State of Vermont—in the apportionable base income. First, I would like to mention the section of the Vermont law § 5820 which states, I believe, that the Vermont corporate income tax is intended to conform with the U.S. Internal Revenue Code except as otherwise expressly provided in order to simplify the taxpayer's filing a return, reduce taxpayer's accounting burdens, and facilitate the collection and administration of the Vermont tax. We believe then returning to § 5811(18) of the Vermont law that in finding Vermont net income and I read that to mean for the taxable year and for a corporate taxpayer the taxable income for the taxpayer for that taxable year under the laws of the U.S. excluding income which under the laws the U.S. is exempt from taxation by the state. Now, the way we interpret this frankly is that Vermont has incorporated to this extent the U.S. income tax law which given to a corporate taxpayer or any taxpayer as far as that's concerned, the election to take foreign taxes either as a credit or as a deduction. Now, we recognize that there is nothing specific in the Vermont law for a credit for a corporation. That's not true as we understand the Vermont law for an individual. An individual, as we read the Vermont law, partnership, a trust, I believe can take credit for foreign taxes.

We have for these years taken a deduction for Vermont purposes of foreign taxes and we believe that we are en-

titled to it under this section 5811(18). Now, also as earlier mentioned, we believe that the *Woolworth* case while not certainly dealing directly with this point—we don't make that contention, but—that the rationale of that case in connection with the taxation of gross-up and gross-up dividends, indicates that there has to be the taxation of such income by the State of Vermont. It has to take into consideration its foreign source and we believe that in this case that if the State of Vermont can constitutionally tax this foreign source of income, that it follows that the expenses particularly these taxes, foreign taxes that are paid in earning that income are deductible just as if the taxes were paid to a state of the U.S. That this is an expense attributable to this foreign income. The final point and it's only a point for the year 1970 is the inclusion of the so-called "gross-up" portion of the dividend in the Vermont tax base. This, of course, was the matter that was specifically dealt with and argued in the *Woolworth* case. We would make the same argument that *Woolworth* made that this is not income. It's notional income, a fictional income. But we have not pressed on this point too strongly since it is a thoroughly minor point in this case and it does not apply to the years '71 and '72 because of the change in the Vermont law. That in summary is the legal contentions of Mobil Oil Corp. and they are set out in skeleton form in the protest for the year 1972 and are made for all three years here in issue.

Lathrop: Let me ask you one thing while I'm thinking about it. Do you want to file a brief with me before I determine? Or not? If you do, I would like to set a time limit.

Evans: Could I respond to that with the following: Would you mind going off that in the record for a minute?

Kendall: Okay, we're back on the record.

Lathrop: Okay so you'll leave me that memo why we ought to do something under 5833(b).

Hellerstein: I would like to give you two copies of a Memorandum in connection with the issue under § 5833(b). We better sign them. No, I'm giving it to you for good.

Lathrop: Now do you have anything else you want to put on the record?

Evans: Yes, could we go off the record and make the changes in the . . .

Hellerstein: Excuse me just a minute . . .

Evans: And then we come back and put it on the record formally?

Hellerstein: I was going to make a suggestion in response to the Commissioner's question as to whether we want to submit a brief. Would it be appropriate to suggest that we would be glad to have you consider our off the record discussion and if as a result of those discussions, it's possible for a compromise to be reached, then there would be no necessity of our submitting a brief on the legal points. If, however, that does not result in an acceptable compromise, then we would like an opportunity to submit a brief.

Lathrop: Right, okay. We will do that.

Hellerstein: Very good. Why don't we go off the record while I make these . . .

Lathrop: You're on.

Evans: Mr. Commissioner, on behalf of Mobil Oil Corp., I would like to submit for the record a document which is titled Stipulation of Facts. However, I understand at this

time that it is being submitted as a testimony on behalf of Mobil Oil Corp. sworn testimony by myself, John Dwight Evans, Jr. as counsel for Mobil Oil Corp. and O. J. Pfalzer, a senior tax advisor for Mobil Oil Corp., as our joint sworn testimony in this case.

Lathrop: Okay, we'll take that as such . . . I really don't, I just don't.

Goldkamp: Can we get on the record so to avoid the problem like we had in *Woolworth* and say that unless this is signed by the Tax Department it won't be considered a stipulation.

Lathrop: Well, I think the record is clear. We can say that but the fact that it is not signed by the Tax Department indicates that it is not a stipulation. We had a problem, and we may still have one, because the County Court is looking at this right now. Yes, well we made the statement so we'll clear it up. I think the record is clear at any point on that score. If there's no other discussion, I'll delve into the interesting matter I was just referring to off the record.

Hellerstein: We have no more evidence or documents. In connection with the submission that we have just made there are also 16 numbered exhibits which have previously been submitted to the state and which are a part of this submission which we submit to you at this time.

Lathrop: Okay. I think we can conclude the hearing, at this point.

Exhibit 1

(Appellant's Vermont Corporate Income Tax Return for 1970)

[Record of Tax Department—Exhibit 1, Filed June 27, 1974]

WASHINGTON SUPERIOR COURT

WASHINGTON COUNTY, STATE OF VERMONT

Docket No. C 13-74 Wnm

MOBIL OIL CORPORATION

—v.—

COMMISSIONER OF TAXES

(see opposite) ☞

Exhibit 1

VERMONT CORPORATE INCOME TAX RETURN

(Including Banking and Loan Franchise Tax Return)

FOR CALENDAR YEAR 1970

or Other Fiscal Year Beginning 1970

and Ending 1971

Mobil Oil Corporation
Mobil Building, P. O. Box 900
Dallas, Texas 75221

(PRINT OR TYPE COMPLETE NAME AND ADDRESS)

Name of Secretary or Clerk of Corporation
A. M. Sherwood

Address of Secretary or Clerk
150 East 42nd Street

City, State, Zip Code of Secretary or Clerk
New York, New York 10017

Date Incorporated
August 10, 1882

Principal Place of Activity in Vermont

First Licensed to Do Business in Vermont
February 2, 1903

City and State Where Books Kept
New York, New York

State of Incorporation
New York

Principal Business Activity
Petroleum

In which of the past five years, if any, have Federal Audits of the corporation's income tax returns resulted in assertions of deficiencies? None

1. Federal Taxable Income (Line 30, Federal Form 1120) See Schedule Attached	$23,081,901.24
2. Interest on U. S. Government Obligations (Line 5, Page 1, Form 1120) Note: Corporations subject to Vermont Franchise Tax should leave this line blank	2,291,179.03
3. Vermont Net Income (Subtract Line 2 from Line 1)	20,790,722.21
4. Vermont Allocation Percentage (From Allocation Schedule, Page 2)	0.146032%

Exhibit 1

5. Net Income Allocable to Vermont (Line 3 multiplied by Line 4)		30,361.11
6. Vermont Tax Rate		6%
7. Vermont Tax (Not less than $25.00)	$	1,821.67
Tax Paid	$	4,000.00
This Return Must Be Accompanied by a Legible Copy of the U. S. Corporation Income Tax Return, Form 1120 (or Form 1120-S), Together With All Supporting Schedules, for the Same Taxable Period. Refund Due	$	(2,178.33)

Please File This Return With the Vermont Department of Taxes, Montpelier, Vermont, Not Later Than the 15th Day of the Third Month After the End of the Corporation's Fiscal Year.

One-half of the Vermont Tax Is Due With This Return. The Balance Is Due 90 Days After the Due Date of This Return.

SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

CORPORATE SEAL	9/3/71	Original Signed By A. B. Huckabee, Jr.	Assistant Secretary
	(Date)	(Signature of Officer)	(Title)

I declare under the penalties of perjury that I prepared this return for the taxpayer named herein; and that this return (including any accompanying schedules and statements) is, to the best of my knowledge and belief, a true, correct, and complete return based on all information relating to the matters required to be reported in this return of which I have any knowledge.

(Date)	(Individual or firm signature)	(Address)

Exhibit 1

CORPORATION ALLOCATION SCHEDULE

	Everywhere	*Vermont*	*Vermont as % of Everywhere*
1. Sales, Receipts, Charges for Services (See Instructions)	$3,577,148,701	$8,554,200	0.239134%
2. Salaries and Wages	$	$	
2(a). Executive Officers' Salaries			
2(b). Balance (Line 2 less Line 2(a))	$ 380,818,887	$ 236,553	0.062118%

3. Property (from balance sheet or reconciled schedule)

3(a). **Everywhere**

	Beginning of Year	*End of Year*
Inventory	$	$
Net Depreciable Assets		
Land		
Other (Specify)		
Sub Totals	$2,388,272,971	$2,543,571,279

Average of Sub Totals	$2,465,922,125
Rented Property (capitalized by 8)	406,000,840
Total Property Everywhere	$2,871,922,965

Exhibit 1

3(b). **Vermont**

	Beginning of Year	*End of Year*
Inventory	$.....	$.....
Net Depreciable Assets	.....	.....
Land	.....	.....
Other (Specify)	.....	.....
Sub Totals	$ 3,508,596	$ 3,802,547
Average of Sub Totals		$ 3,655,572
Rented Property (capitalized by 8)		274,528
Total Vermont Property		$ 3,930,100

3(c). **Vermont Property as percent of Property Everywhere** 0.136845%

4. TOTAL OF THE THREE PERCENTAGES (Vermont as % of Everywhere) ABOVE 0.438097

5. VERMONT ALLOCATION PERCENTAGE (Line 4 ÷ 3) 0.146032%

Exhibit 1

MOBIL OIL CORPORATION
VERMONT CORPORATION INCOME TAX RETURN

Year 1970

Federal Taxable Income		$220,035,244.23
Less:		
Non-apportionable Income		
Dividends	$174,211,073.60	
Interest	10,520,792.51	
Foreign Taxes	12,221,476.88	
		196,953,342.99
		$ 23,081,901.24

Exhibit 1

FORM 1120—U. S. CORPORATION INCOME TAX RETURN
YEAR ENDED DECEMBER 31, 1970

MOBIL OIL CORPORATION 13-5401570

GROSS INCOME

01	Gross Receipts or Gross Sales	$4,132,112,461.09—
02	Less Cost of Goods Sold	2,387,111,460.13
03	Gross Profit	1,745,001,000.96—
04	Dividends Schedule C	275,136,957.66—
05	Interest on U.S. Obligations	2,291,179.03—
06	Other Interest	22,691,490.65—
07	Gross Rents	52,290,463.51—
08	Gross Royalties	2,816,662.47—
09	Net Gains (Losses) Separate Schedule D	2,582,816.59—
10	Other Income	4,709,247.36—
11	Total Income Lines 3 through 10	$2,107,519,818.23—

DEDUCTIONS

13	Salaries and Wages Not Deducted Elsewhere	$ 229,632,058.24
14	Repairs	145,060,989.10
15	Bad Debts	26,486,399.42
16	Rents	116,886,797.44
17	Taxes	717,153,747.03
18	Interest	22,427,826.16
19	Contributions	1,490,531.80
20	Amortization	21,625.54

Exhibit 1

21	Depreciation	49,513,588.00
22	Depletion	84,090,646.41
23	Advertising	33,815,886.98
24	Profit Sharing, Stock Bonus, Pension, Annuity	21,504,741.16
25	Other Employee Benefit Plans	23,382,969.00
26	Other Deductions	315,090,883.66
27	Total Deductions Lines 12 through 26	$1,786,558,689.94
28	Taxable Income Subtotal Line 11 less Line 27	320,961,128.29—
29B	85 Pct. of Domestic Corporation Dividends	100,925,884.06
30	Taxable Income Line 28 less Line 29	$ 220,035,244.23—

Exhibit 1

FORM 1120—U. S. CORPORATION INCOME TAX RETURN

SCHEDULE M-1 RECONCILIATION OF INCOME PER BOOKS WITH INCOME PER RETURN YEAR ENDED DECEMBER 31, 1970

MOBIL OIL CORPORATION 13-5401570

01	Net Income Per Books	$ 578,521,620.38—
02	Federal Income Tax	54,142,980.68—
040	Receipt of Dividends Accrued in Prior Years	55,374,824.43—
040	Gross-up of Foreign Dividends (Section 78)	354,859.00—
040	Adjustment of Sales for Take or Pay Contracts	2,121,860.75
040	Federal Power Commission Reserve Adjustment	7,852,000.00—
040	Adjust Partnership Income	7,169,326.00—
040	Miscellaneous Other Adjustments	817,434.94—
040	Deferred Gain on Sale of Pipeline Stock	95,253.17—
040	Reflect Tax Gain on Sale of Pipeline Stock	5,208,082.62—
04	Taxable Income Not Recorded on Books This Yr	74,749,919.41—
050	Adjust Current Provision for Foreign Taxes	12,221,476.88—
050	Adjust Reserve for Retirement and Separation Benefits	4,500,000.00—
050	Adjust Reserve for Revaluation of Investments	13,963,413.03—
050	Deferral of Blocked Income	35,578.67—
050	Adjust Partnership Income	464,317.00—

Exhibit 1

050	Unallowable Amortization of Non-Producing Properties	29,842,438.00—
050	Unallowable Amortization of Intangible Drilling Costs	35,314,854.00—
050	Exploration Expenses Capitalized	2,900,000.00—
050	Unallowable Provision for Deferred Income Taxes	7,796,000.00
050	Unallowable Legislative Department Expenses	50,368.17—
050	Adjust Vacation Pay	47,626.27—
050	Adjust Incentive Bonus	1,014,723.00—
050	Unallowable Accrued Anticipated Losses	4,246,375.21—
050	Allocation of Expenses Charged to Other Companies	1,229,838.66—
050	Miscellaneous Other Adjustments	3,682,804.40—
05	Expenses Per Books Not Per Tax	101,717,813.29—
06	Total of Lines 1 through 5	809,132,333.76—
070	Excess of Capital Losses Over Capital Gains	18,376.52
070	Accrued Dividend Income Not Received	36,781,268.64
070	Dividends Received as Return of Capital	1,693.48
070	Adjust Lease Income for Carve-out Production Payments	1,240,958.26
070	Eliminate Interest on State and Municipal Obligations	70,156.18
070	Deferral of Blocked Income	267,390.34
070	Adjustment on Disposal of Section 1231 Property	5,354,41—

Exhibit 1

070	Adjust Partnership Income	444,829.50
070	Miscellaneous Other Adjustments	103,594.00
070	Consolidation Dividend Elimination	254,026,469.00
070	Deferred Gain on Sale of Pipeline Stock	37,190,727.62
07	Income Per Books Not Per Tax	330,140,109.13
080	Adjust Reserve for Bad Debts	3,018,019.80
080	Amortization of Initial Bad Debt Reserve	424,140.00
080	Adjust Reserve for Retirement and Separation Benefits	846,547.00
080	Federal Power Commission Reserve Adjustment	62,770.87
080	Adjust Partnership Income	600,000.00
080	Depreciation	9,176,003.03
080	Depletion	82,389,627.41
080	Intangible Drilling Expenses	33,150,818.00
080	Abandonment of Wells and Leases	23,236,338.00
080	Writeoff Prior Years Exploration Expenses Capitalized	1,500,000.00
080	Adjustment of Capitalized Lifting Costs	1,661,256.00
080	Excess of FMV Over Basis of Property Donated	1,353,161.00
080	Adjustment of Advance Payments	165,396.85
080	Miscellaneous Other Adjustments	67,871.78
080	Amortization—Miscellaneous	21,625.54
080	Interest on State Tax Deficiencies	113,000.00

Exhibit 1

080	Disqualifying Disposition of Stock Options Adjustment	244,521.06
08	Deductions Per Tax Not Per Books	158,031,096.34
09	Total of Lines 7 and 8	488,171,205.47
10	Income (Line 28 Page 1)—Line 6 less 9	320,961,128.29—

Exhibit 1

FORM 1120—U. S. CORPORATION INCOME TAX RETURN

SCHEDULE L—BALANCE SHEETS

MOBIL OIL CORPORATION 13-5401570

	Assets	*Dec. 31, 1969*	*Dec. 31, 1970*
01	Cash	$ 76,229,713.04	$ 82,316,588.26
02A	Trade Notes and Accounts Receivable	581,507,384.41	555,065,601.11
02B	Less Allowance for Bad Debts	12,439.302.11—	12,174,818.44—
03	Inventories	375,535,874.85	408,436,103.33
04A	Obl. of U.S. and Instrumentalities	58,645,283.20	37,434,074.59
04B	Obl. of State, Subdivisions Thereof	2,794,011.51	1,090,063.51
05	Other Current Assets	131,406,952.11	463,865,349.62
07	Mortgage and Real Estate Loans	6,953,430.14	6,746,291.25
08	Other Investments	1,682,906,751.58	1,939,872,061.93
09A	Bldgs. and Other Fixed Depr. Assets	2,597,722,553.93	2,774,666,728.77
09B	Less Accumulated Depreciation	1,374,384,910.33—	1,466,828,329.86—
10A	Depletable Assets	292,360,724.00	314,855,951.00
10B	Less Accumulated Depletion	164,441,101.00—	175,658,525.00—
11	Land Net of Any Amortization	241,592,293.98	278,227,828.31

Exhibit 1

12A	Intangible Assets Amortizable Only	1,027,354,887.00	1,046,155,224.00
12B	Less Accumulated Amortization	607,467,352.00—	636,283,702.00—
13	Other Assets	62,035,648.65	46,741,068.71
14	Total Assets	4,978,312,842.96	5,664,527,559.09
	Liabilities and Stockholders Equity		
15	Accounts Payable	316,327,935.78—	335,913,888.44—
16	Mtges., Notes, Etc. Payable—Less 1 Yr.	61,141,175.96—	30,144,468.04—
17	Other Current Liabilities	207,378,793.21—	334,362,984.25—
19	Mtges., Notes, Etc. Payable—More 1 Yr.	295,527,676.67—	475,848,667.47—
20	Other Liabilities	341,267,675.68—	404,745,908.50—
21B	Capital Stock Common	770,177,017.50—	770,971,995.00—
22	Paid-in or Capital Surplus	637,635,494.90—	640,623,012.99—
23	Retained Earnings—Appropriated	402,910.00—	402,910.00—
24	Retained Earnings—Unappropriated	2,396,880,226.73—	2,732,306,656.51—
25	Less Cost of Treasury Stock	48,426,063.47	60,792,932.11
26	Total Liab. and Stockholders Equity	4,978,312,842.96—	5,664,527,559.09—

Exhibit 2

(Appellant's Vermont Corporate Income Tax Return for 1971)

[Filed June 27, 1974]

WASHINGTON SUPERIOR COURT

WASHINGTON COUNTY, STATE OF VERMONT

Docket No. C 13-74 Wnm

[TITLE OMITTED IN PRINTING]

(see opposite) ☞

Exhibit 2

VERMONT CORPORATE INCOME TAX RETURN

(Including Banking and Loan Franchise Tax Return)

1971

or Other Fiscal Year Beginning 1971

and Ending 1972

Mobil Oil Corporation
P. O. Box 900
Mobil Building
Dallas, Texas 75221

(PRINT OR TYPE COMPLETE NAME AND ADDRESS)

Name of Secretary or Clerk of Corporation
G. A. Birrell

Address of Secretary or Clerk
150 East 42nd Street

City, State, Zip Code of Secretary or Clerk
New York, New York 10017

Date Incorporated
8/10/1882

Principal Place of Activity in Vermont

First Licensed to Do Business in Vermont
2/2/1903

City and State Where Books Kept
New York, New York

State of Incorporation
New York

Principal Business Activity
Petroleum

In which of the past five years, if any, have Federal Audits of the corporation's income tax returns resulted in assertions of deficiencies? None

1. Federal Taxable Income (Fed. 1120, Line 30 or 1120S, Line 28) See Sch. Attached		($21,832,840.91)
2. Less: (a) Interest on U. S. Government Obligations	$1,235,832.40	
(b) "Gross-Up" (only) of Foreign Dividends required by IRC Sec. 78 and included in Line 1 above		1,235,832.40
(Corps. subject to Franchise Tax leave Line (a) blank.)		
3. Vermont Net Income (Line 1 less Line 2)		(23,068,673.31)

Exhibit 2

4. Vermont Allocation %—From Schedule where applicable		.173647%
5. Net Income Allocable to Vermont (Line 3 x Line 4)		(40,058.06)
6. Subchapter 'S' Corps. enter here income distributed or distributable to Shareholders not residents of Vermont	$.....	
7. Vermont Tax Rate (Reg. Corps. apply to Line 5—Sub 'S' Corps. apply to Line 6—enter on Line 8)		6%
8. Vermont Tax (Not less than $25.00)	$	—0—
9. Less Previous Payments		750.00
10. Balance Due or Overpayment		(750.00)

The tax due on Line 8, if $500 or less, is payable in full on the statutory due date of the return—if more than $500., one-half is payable on the statutory due date and the balance 90 days thereafter. Make checks payable to "Vermont Department of Taxes."
The return is due not later than the 15th day of the third month following the end of the Corporation's taxable year.
ATTACH A COPY of the U.S. Corporation return (Form 1120 or 1120S) and all supporting schedules. See Instructions. Mail to Vermont Dept. of Taxes, Montpelier, Vermont 05602.

SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

CORPORATE SEAL	9/19/72	Original Signed By A. B. HUCKABEE, JR.	Assistant Secretary
	(Date)	(Signature of Officer)	(Title)

I declare under the penalties of perjury that I prepared this return for the taxpayer named herein; and that this return (including any accompanying schedules and statements) is, to the best of my knowledge and belief, a true, correct, and complete return based on all information relating to the matters required to be reported in this return of which I have any knowledge.

.....	.....	.....
(Date)	(Individual or firm signature)	(Address)

Exhibit 2

CORPORATION ALLOCATION SCHEDULE

	Everywhere	*Vermont*	*Vermont as % of Everywhere*
1. Sales, Receipts, Charges for Services ..... (See Instructions)	$3,889,353,228	$9,175,931	.235924%
2. SALARIES AND WAGES	$	$	
2(a). Executive Officers' Salaries			
2(b). Balance (Line 2 less Line 2(a))	$ 400,087,593	$ 244,577	.061131%

3. PROPERTY (from balance sheet or reconciled schedule)

3(a). **Everywhere**

	**Beginning of Year*	*End of Year*
Inventory	$.....	$.....
Net Depreciable Assets	.....	.....
Land	.....	.....
Other (Specify)	.....	.....
Sub Totals	$2,543,571,279	$2,662,781,450
Average of Sub Totals	$2,603,176,365	
Rented Property (capitalized by 8)	392,773,760	
Total Property Everywhere	$2,995,950,125	

Exhibit 2

3(b). **Vermont**

	**Beginning of Year*	*End of Year*
Inventory	$.....	$ .....
Net Depreciable Assets	.....	.....
Land	.....	.....
Other (Specify)	.....	.....
Sub Totals	$ 3,802,547	$ 3,971,257
Average of Sub Totals		$ 3,386,902
Rented Property (capitalized by 8)		2,820,632
Total Vermont Property		$ 6,707,534

3(c). **Vermont Property as percent of Property Everywhere** ..... .223887%

4. TOTAL OF THE THREE PERCENTAGES (Vermont as % of Everywhere) ABOVE ..... .520942

5. VERMONT ALLOCATION PERCENTAGE (Line 4 div. by 3) .... .173647%

* If less than full year, see instructions.

Exhibit 2

MOBIL OIL CORPORATION
VERMONT CORPORATION INCOME TAX RETURN

Year 1971

Federal Taxable Income		308,253,570.02
Less:		
Non-Apportionable Income		
Dividends	282,817,008.65	
Interest	12,609,826.23	
Foreign Taxes	34,659,576.05	
		330,086,410.93
		(21,832,840.91)

Exhibit 2

1971—FORM 1120—U.S. CORPORATION INCOME TAX RETURN
YEAR ENDED DECEMBER 31, 1971

MOBIL OIL CORPORATION 13-5401570

GROSS INCOME

01	Gross Receipts or Gross Sales	$4,448,278,886.01—
02	Less Cost of Goods Sold	2,649,554,939.73
03	Gross Profit	1,798,723,946.28
04	Dividends Schedule C	387,846,897.82—
05	Interest on U.S. Obligations	1,235,832.40—
06	Other Interest	33,419,652.59—
07	Gross Rents	56,443,036.35—
08	Gross Royalties	3,213,527.93—
09A	Net Capital Gains—Separate Schedule D	17,756,170.46—
09B	Ordinary Gain or (Loss)—Part II, Form 4797	3,534,271.66—
10	Other Income	4,246,815.76—
11	Total Income Lines 3 through 10	2,306,420,151.25—

DEDUCTIONS

12	Compensation of Officers Schedule E	
13	Salaries and Wages Not Deducted Elsewhere	243,600,335.10
14	Repairs	148,414,998.30
15	Bad Debts	27,895,239.45
16	Rents	124,727,709.51
17	Taxes	752,679,076.39

Exhibit 2

18	Interest	32,713,879.51
19	Contributions	596,153.09
20	Amortization	830,384.54
21	Depreciation	50,858,569.52
22	Depletion	95,829,081.00
23	Advertising	38,209,721.00
24	Pension, Profit-Sharing, etc. Plans	41,363,638.85
25	Employee Benefit Programs	17,036,462.73
26	Other Deductions	318,381,443.07
27	Total Deductions Lines 12 through 26	1,893,136,692.06
28	Taxable Income Subtotal Line 11 less Line 27	413,283,459.19—
29B	85 PCT of Domestic Corporation Dividends	105,029,889.17
30	Taxable Income Line 28 Less Line 29	308,253,570.02—

Exhibit 2

1971—FORM 1120—U.S. CORPORATION INCOME TAX RETURN

SCHEDULE M-1 RECONCILIATION OF INCOME PER BOOKS WITH INCOME PER RETURN
YEAR ENDED DECEMBER 31, 1971

MOBIL OIL CORPORATION 13-5401570

01	Net Income Per Books	$812,513,535.59—
02	Federal Income Tax	27,777,000.00—
040	Receipt of Dividends Accrued in Prior Years	33,866,112.18—
040	Gross-Up of Foreign Dividends (Section 78)	308,171.00—
040	Record Section 1245 Income	3,892.78—
040	Adjust Partnership Income	199,827.00—
040	Adjustment of Advance Payments	6,438,547.00—
040	Miscellaneous Other Adjustments	806,684.41—
040	Record Additional Dividend Income	14,680,751.00—
04	Taxable Income Not Recorded on Books This Yr.	56,303,985.37—
050	Adjust Current Provision for Foreign Taxes	34,659,576.05—
050	Federal Power Commission Reserve Adjustment	1,116,000.00—
050	Unallowable Amortization of Non-Producing Properties	31,890,425.00—
050	Unallowable Amortization of Intangible Drilling Costs	36,077,867.00—
050	Exploration Expenses Capitalized	3,000,000.00—
050	Unallowable Provision for Deferred Income Taxes	462,000.00—

Exhibit 2

050	Unallowable Legislative Department Expenses	4,452.80—
050	Adjust Vacation Pay	28,559.28—
050	Adjust Incentive Bonus	1,149,210.50—
050	Unallowable Accrued Anticipated Losses	24,398,887.49
050	Exchange Gain or Loss	361,963.08—
050	Adjustment of Advance Payments	590,216.00—
050	Allocation of Expenses Charged to Other Companies	789,848.33—
050	Miscellaneous Other Adjustments	738,663.00—
05	Expenses Per Books Not Per Tax	86,469,893.55—
06	Total of Lines 1 Through 5	983,064,414.51—
070	Accrued Dividend Income Not Received	15,940,951.07
070	Adjustment of Sales for Take Or Pay Contracts	1,426,498.78
070	Eliminate Interest on State and Municipal Obligations	82,298.65
070	Deferral of Blocked Income	216,365.92
070	Elimination of Profit on Mobil Bonds	1,215,549.13
070	Adjustment on Disposal of Section 1231 Property	161,621.86
070	Adjust Partnership Income	6,783.51
070	Consolidation Dividend Elimination	382,409,728.68
070	Dissolution Gains and Losses	1,553,626.87
07	Income Per Books Not Per Tax	403,013,424.47
080	Adjust Reserve for Bad Debts	985,663.58
080	Amortization of Initial Bad Debt Reserve	424,140.00

Exhibit 2

080	Adjust Reserve for Retirement and Separation Benefits	5,042,242.52
080	Adjustment of Sales of Securities	2,370,303.76—
080	Adjust Partnership Income	119,328.84
080	Depreciation	15,066,960.78
080	Depletion	97,696,503.65

Exhibit 2

1971—FORM 1120—U.S. CORPORATION INCOME TAX RETURN

SCHEDULE M-1 RECONCILIATION OF INCOME PER BOOKS WITH INCOME PER RETURN
YEAR ENDED DECEMBER 31, 1971

MOBIL OIL CORPORATION 13-5401570

080	Adjust Vacation Pay	227,000.00
080	Interest on U.S. Deficiencies	1,906,023.36
080	Intangible Drilling Expenses	30,409,091.00
080	Abandonment of Wells and Leases	12,411,729.34
080	Writeoff Prior Years Exploration Expenses Capitalized	1,500,000.00
080	Adjustment of Capitalized Lifting Costs	1,413,410.00
080	Excess of FMV Over Basis of Property Donated	32,790.00
080	Adjustment of Advance Payments	472,836.00
080	Miscellaneous Other Adjustments	127,224.67
080	Amortization—Miscellaneous	21,625.54
080	Interest on State Tax Deficiencies	147,956.55
080	Disqualifying Disposition of Stock Options Adjustment	324,549.78
080	Mine Development Expenditures	808,759.00
08	Deductions Per Tax Not Per Books	166,767,530.85
09	Total of Lines 7 and 8	569,780,955.32
10	Income (Line 28, Page 1)—Line 6 Less 9	413,283,459.19—

Exhibit 2

1971—FORM 1120—U.S. CORPORATION INCOME TAX RETURN

SCHEDULE L—BALANCE SHEETS

MOBIL OIL CORPORATION 13-5401570

	Assets	Dec. 31, 1970	Dec. 31, 1971
01	Cash	$ 82,316,588.26	$ 79,387,192.28
02A	Trade Notes and Accounts Receivable	555,065,601.11	535,824,047.22
02B	Less Allowance for Bad Debts	12,174,818.44—	16,351,695.72—
03	Inventories	408,436,103.33	424,230,096.91
04A	Obl. of U.S. and Instrumentalities	37,434,074.59	797,618.12
04B	Obl. of State, Subdivisions Thereof	1,090,063.51	
05	Other Current Assets	463,865,349.62	395,528,309.37
07	Mortgage and Real Estate Loans	6,746,291.25	3,515,419.55
08	Other Investments	1,939,872,061.93	2,563,568,400.58
09A	Bldgs. and Other Fixed Depr. Assets	2,774,666,728.77	2,925,380,712.59
09B	Less Accumulated Depreciation	1,466,828,329.86—	1,520,498,218.46—
10A	Depletable Assets	314,855,951.00	349,079,232.00
10B	Less Accumulated Depletion	175,658,525.00—	184,290,663.00—
11	Land Net of Any Amortization	278,227,828.31	309,141,456.51

Exhibit 2

12A	Intangible Assets Amortizable Only	1,046,155,224.00	1,035,691,550.00
12B	Less Accumulated Amortization	636,283,702.00—	675,952,717.00—
13	Other Assets	46,741,068.71	45,305,860.55
14	Total Assets	5,664,527,559.09	6,270,356,601.50
	Liabilities and Stockholders' Equity		
15	Accounts Payable	335,913,888.44—	319,181,621.64—
16	Mtges., Notes, etc., Payable—Less 1 Yr.	30,144,468.04—	31,661,053.23—
17	Other Current Liabilities	334,362,984.25—	290,380,908.70—
19	Mtges., Notes, etc., Payable—More 1 Yr.	475,848,667.47—	664,258,179.72—
20	Other Liabilities	404,745,908.50—	317,819,770.16—
21B	Capital Stock Common	770,971,995.00—	772,696,440.00—
22	Paid-In or Capital Surplus	640,623,012.99—	648,738,926.35—
23	Retained Earnings—Appropriated	402,910.00—	402,910.00—
24	Retained Earnings—Unappropriated	2,732,306,656.51—	3,286,016,587.45—
25	Less Cost of Treasury Stock	60,792,932.11	60,799,795.75
26	Total Liabilities and Stockholders Equity	5.664,527,559.09—	6,270,356,601.50—

Exhibit 3

(Appellant's Vermont Corporate Income Tax Return for 1972)

[Filed June 27, 1974]

WASHINGTON SUPERIOR COURT

WASHINGTON COUNTY, STATE OF VERMONT

Docket No. C 13-74 Wnm

[TITLE OMITTED IN PRINTING]

(see opposite) ☞

Exhibit 3

VERMONT CORPORATE INCOME TAX RETURN
(Including Banking and Loan Franchise Tax Return)

1972
or Other Fiscal Year Beginning 1972
and Ending 1973

Mobil Oil Corporation
P. O. Box 900
Mobil Building
Dallas, Texas 75221

(PRINT OR TYPE COMPLETE NAME AND ADDRESS)

Name of Secretary or Clerk of Corporation
G. A. Birrell

Address of Secretary or Clerk
150 East 42nd Street

City, State, Zip Code of Secretary or Clerk
New York, New York 10017

Date Incorporated
8-10-1882

Principal Place of Activity in Vermont

First Licensed to Do Business in Vermont
2-2-1903

City and State Where Books Kept
New York, New York

State of Incorporation
New York

Principal Business Activity
Petroleum

In which of the past five years, if any, have Federal Audits of the corporation's income tax returns resulted in assertions of deficiencies?

1. Federal Taxable Income (Fed. 1120, Line 30 or 1120S, Line 28) See Sch. Attached		$(89,963,133.10)
2. Less: (a) Interest on U. S. Government Obligations	$45,602.43	
(b) "Gross-Up" (only) of Foreign Dividends required by IRC Sec. 78 and included in Line 1 above		45,602.43
(Corps. subject to Franchise Tax leave Line (a) blank.)		
3. Vermont Net Income (Line 1 less Line 2)		(90,008,735.53)
4. Vermont Allocation %—From Schedule where applicable		.182151%

Exhibit 3

5. Net Income Allocable to Vermont (Line 3 x Line 4)		(163,951.81)
6. Subchapter 'S' Corps. enter here income distributed or distributable to Shareholders not residents of Vermont	$.....	
7. Vermont Tax Rate (Reg. Corps. apply to Line 5—Sub 'S' Corps apply to Line 6—enter on Line 8)		6%
8. Vermont Tax (Not less than $25.00)	$	25.00
9. Less Previous Payments		25.00
10. Balance Due or Overpayment		—0—

The tax due on Line 8, if $500 or less, is payable in full on the statutory due date of the return—if more than $500., one-half is payable on the statutory due date and the balance 90 days thereafter. Make checks payable to "Vermont Department of Taxes."

The return is due not later than the 15th day of the third month following the end of the Corporation's taxable year.

ATTACH A COPY of the U.S. Corporation return (Form 1120 or 1120S) and all supporting schedules. See Instructions. Mail to Vermont Dept. of Taxes, Montpelier, Vermont 05602.

SIGNATURE AND DECLARATION

I declare, under the penalties of perjury, that this return (including any accompanying schedules and statements) is true, and correct and complete to the best of my knowledge. If prepared by a person other than the taxpayer his declaration further provides that under 32 VSA 6001, this information has not been and will not be used for any other purpose, or made available to any other person, other than for the preparation of this return unless a separate valid consent form is signed by the taxpayer and retained by the preparer.

Original Signed By
A. B. HUCKABEE, JR. Assistant Secretary 7-25-73

Signature of Corporation Officer Title Date

Prepared by Company's Own Staff

Signature of Preparer Firm Name Date

Address of Preparer

FORM 104

Exhibit 3

CORPORATION ALLOCATION SCHEDULE

	Everywhere	*Vermont*	*Vermont as % of Everywhere*
1. Sales, Receipts, Charges for Services (See Instructions)	$4,049,824,161	$9,589,447	.236787%
2. SALARIES AND WAGES	$ 432,081,913	$ 254,938	
2(a). Executive Officers' Salaries	3,181,232	—0—	
2(b). Balance (Line 2 less Line 2(a)	$ 428,900,681	$ 254,938	.059440%

3. PROPERTY (from balance sheet or reconciled schedule)

3(a). **Everywhere**

	**Beginning of Year*	*End of Year*
Inventory	$.....	$.....
Net Depreciable Assets	.....	.....
Land	.....	.....
Other (Specify)	.....	.....
Sub Totals	$2,662,781,450	$2,864,792,471

Average of Sub Totals	$2,763,786,961
Rented Property (capitalized by 8)	527,970,760
Total Property Everywhere	$3,291,757,721

Exhibit 3

3(b). **Vermont**

	**Beginning of Year*	*End of Year*
Inventory	$.....	$.....
Net Depreciable Assets	.....	.....
Land	.....	.....
Other (Specify)	.....	.....
Sub Totals	$ 3,971,257	$ 6,328,183

Average of Sub Totals	$ 5,149,720
Rented Property (capitalized by 8)	3,087,072
Total Vermont Property	$ 8,236,792

(c). **Vermont Property as percent of Property Everywhere** ..... .250225%

4. TOTAL OF THE THREE PERCENTAGES (Vermont as % of Everywhere) ABOVE ..... .546452

5. VERMONT ALLOCATION PERCENTAGE (Line 4 div. by 3) .... .182151%

* If less than full year, see instructions.

Exhibit 3

MOBIL OIL CORPORATION
VERMONT CORPORATION INCOME TAX RETURN

Year 1972

Federal Taxable Income (Line 30 of Federal 1120)		232,825,728.27
Less:		
Non-Apportionable Income		
Dividends	280,623,403.93	
Interest	3,905,208.04	
Foreign Taxes	38,260,249.40	
		322,788,861.37
		(89,963,133.10)

1972—FORM 1120

U. S. CORPORATION INCOME TAX RETURN

YEAR ENDED DECEMBER 31, 1972

MOBIL OIL CORPORATION 13-5401570

GROSS INCOME

01	Gross Receipts or Gross Sales	4,654,306,686.68—
02	Less Cost of Goods Sold	2,738,466,513.41
03	Gross Profit	1,915,840,173.27—
04	Dividends Schedule C	427,146,672.33—
05	Interest on U.S. Obligations	45,602.43—
06	Other Interest	30,167,877.91—
07	Gross Rents	59,611,160.61—
08	Gross Royalties	3,647,247.75—
09A	Net Capital Gains—Separate Schedule D	299,152.17—
09B	Ordinary Gain or (Loss)—Part II, Form 4797	3,070,413.64—
10	Other Income	5,038,693.89—
11	Total Income Lines 3 through 10	2,444,866,994.00—

DEDUCTIONS

12	Compensation of Officers Schedule E	
13	Salaries and Wages Not Deducted Elsewhere	257,531,200.16
14	Repairs	166,829,484.86
15	Bad Debts	19,891,235.76
16	Rents	133,232,840.85
17	Taxes	829,894,691.74

Exhibit 3

18	Interest	43,556,805.74
19	Contributions	1,096,208.90
20	Amortization	19,774.44
21	Depreciation	60,121,823.41
22	Depletion	102,976,724.75
23	Advertising	41,360,516.23
24	Pension, Profit-Sharing, Etc. Plans	27,278,935.32
25	Employee Benefit Programs	23,500,310.38
26	Other Deductions	358,227,444.79
27	Total Deductions Lines 12 throught 26	2,065,517,997.33
28	Taxable Income Subtotal Line 11 less Line 27	379,348,996.67—
29B	85 Pct. of Domestic Corporation Dividends	146,523,268.40
30	Taxable Income Line 28 less Line 29	232,825,728.27—

Exhibit 3

1972—FORM 1120—U.S. CORPORATION INCOME TAX RETURN

SCHEDULE M-1 RECONCILIATION OF INCOME PER BOOKS WITH INCOME PER RETURN

YEAR ENDED DECEMBER 31, 1972

MOBIL OIL CORPORATION 13-5401570

01	Net Income Per Books	716,235,689.79—
02	Federal Income Tax	8,054,587.32—
040	Receipt of Dividends Accrued in Prior Years	15,283,306.31—
040	Gross-Up of Foreign Dividends (Section 78)..	512,303.00—
040	Adjustment on Disposal of Section 1231 Property	1,532,395.92—
040	Miscellaneous Other Adjustments	18,645.62
04	Taxable Income Not Recorded on Books This Yr.	17,309,359.61—
050	Adjust Current Porvision for Foreign Taxes	38,260,249.40—
050	Federal Power Commission Reserve Adjustment	149,963.62
050	Adjust Partnership Income	245,342.00—
050	Unallowable Amortization of Non-Producing Properties	38,143,220.00—
050	Unallowable Amortization of Intangible Drilling Costs	35,554,339.00—
050	Unallowable Provision for Deferred Income Taxes	12,682,466.34—
050	Unallowable Legislative Department Expenses	4,124.92—
050	Adjust Incentive Bonus	540,454.77—

Exhibit 3

050	Unallowable Accrued Anticipated Losses	5,665,936.32—
050	Exchange Gain or Loss	951,730.54—
050	Adjustment of Advance Payments	597,346.00—
050	Allocation of Expenses Charged to Other Companies	359,971.75—
050	Miscellaneous Other Adjustments	2,101,931.59—
050	Adjust to Tax Loss on Sale of Colpet&Sagoc	814,194.72—
050	Capitalize BMI Royalty Payments	884,646.20—
05	Expenses Per Books Not Per Tax	136,655,989.93—
06	Total of Lines 1 through 5	878,255,626.65—
070	Accrued Dividend Income Not Received	44,177,396.40
070	Dividends Received as Return of Capital	826,804.42
070	Adjustment of Sales for Take or Pay Contracts	285,297.68
070	Federal Power Commission Reserve Adjustment	4,858,456.42
070	Eliminate Interest on State and Municipal Obligations	70,785.66
070	Deferral of Blocked Income	204,656.33
070	Elimination of Profit on Mobil Bonds	234,500.00
070	Adjust Partnership Income	65,442.00
070	Miscellaneous Other Adjustments	66,942.17
070	Consolidation Dividend Elimination	255,088,346.48
070	Dissolution Gains and Losses	456,402.00
070	Eliminate Gain on Sale of Treasury Stock	6,903.97

Exhibit 3

070	Deferred Intercompany Gains/Losses	4,372.38
07	Income Per Books Not Per Tax	306,346,305.91
080	Adjust Reserve for Bad Debts	3,579,702.00
080	Amortization of Initial Bad Debt Reserve	424,140.00
080	Adjust Reserve for Retirement and Separation Benefits	943,721.84
080	Federal Power Commission Reserve Adjustment	5,223,42
080	Adjust Partnership Income	71,885.64
080	Exploration Expenses Capitalized	5,000,000.00—
080	Depreciation	16,442,501.68
080	Depletion	96,303,526.75
080	Adjust State and Local Franchise and Income Taxes	994,058.49
080	Interest on U.S. Deficiencies	1,301,723.94
080	Intangible Drilling Expenses	39,167,631.00
080	Abandonment of Wells and Leases	25,649,363.00
080	Writeoff Prior Years Exploration Expenses Capitalized	1,800,000.00
080	Adjustment of Capitalized Lifting Costs	606,442.00
080	Exchange Gain or Loss	2,994,058.50
080	Excess of FMV Over Basis of Property Donated	474,515.00
080	Adjustment of Advance Payments	1,896,868.00
080	Miscellaneous Other Adjustments	218,252.00

Exhibit 3

080	Amortization—Miscellaneous	21,029.44
080	Interest on State Tax Deficiencies	248,734.80
080	Disqualifying Disposition of Stock Options Adjustment	383,164.69
080	Mine Development Expenditures	1,255.00—
080	Dissolution Gains and Losses	24,229.88
080	Settlement of India Aid Claim	2,800,000.00
080	Share of National Corp. for Housing Partnership Loss	17,520.00
080	Commission re: Disc Sales	128,884.00
080	Adjust for Proceeds from Nonrecourse Loan	1,064,403.00
08	Deductions Per Tax Not Per Books	192,560,324.07
09	Total of Lines 7 and 8	498,906,629.98
10	Income (Line 28 Page 1)—Line 6 less 9	379,348,996.67—

Exhibit 3

1972—FORM 1120
U. S. CORPORATION INCOME TAX RETURN

SCHEDULE L—BALANCE SHEETS

MOBIL OIL CORPORATION 13-5401570

	Assets	*Dec. 31, 1971*	*Dec. 31, 1972*
01	Cash	79,387,192.28	67,040,496.12
02A	Trade Notes and Accounts Receivable	535,824,047.22	610,822,440.02
02B	Less Allowance for Bad Debts	16,351,695.72—	16,161,241.96—
03	Inventories	424,230,096.91	405,914,665.04
04A	Obl. of U.S. and Instrumentalities	797,618.12	292,618.12
05	Other Current Assets	395,528,309.37	207,276,466.09
07	Mortgage and Real Estate Loans	3,515,419.55	3,723,530.58
08	Other Investments	2,563,568,400.58	3,065,533,179.60
09A	Bldgs. and Other Fixed Depr. Assets	2,925,380,712.59	3,116,590,757.17
09B	Less Accumulated Depreciation	1,520,498,218.46—	1,612,160,901.24—
10A	Depletable Assets	349,079,232.00	347,510,498.00
10B	Less Accumulated Depletion	184,290,663.00—	201,353,552.00—
11	Land Net of Any Amortization	309,141,456.51	344,390,608.18

Exhibit 3

12A	Intangible Assets Amortizable Only	1,035,691,550.00	1,173,552,472.00
12B	Less Accumulated Amortization	675,952,717.00—	709,652,076.00—
13	Other Assets	45,305,860.55	50,063,882.78
14	Total Assets	6,270,356,601.50	6,853,383,842.50
	Liabilities and Stockholders Equity		
15	Accounts Payable	319,181,621.64—	326,315,731.64—
16	Mtges., Notes, Etc. Payable—Less 1 Yr.	31,661,053.23—	41,477,857.49—
17	Other Current Liabilities	290,380,908.70—	325,653,326.18—
19	Mtges., Notes, Etc. Payable—More 1 Yr.	664,258,179.72—	641,559,204.73—
20	Other Liabilities	317,819,770.16—	415,828,020.82—
21B	Capital Stock Common	772,696,440.00—	774,166,755.00—
22	Paid-in or Capital Surplus	648,738,926.35—	655,853,184.54—
23	Retained Earnings—Appropriated	402,910.00—	402,910.00—
24	Retained Earnings—Unappropriated	3,286,016,587.45—	3,732,903,503.44—
25	Less Cost of Treasury Stock	60,799,795.75	60,776,651.34
26	Total Liab. and Stockholders Equity	6,270,356,601.50—	6,853,383,842.50—

Exhibit 8

(Appellant's Source of Dividend Income Schedule)

[Record of Tax Department—Exhibit 8, Filed June 27, 1974]

WASHINGTON SUPERIOR COURT

WASHINGTON COUNTY, STATE OF VERMONT

Docket No. C 13-74 Wnm

[TITLE OMITTED IN PRINTING]

(see opposite) ☞

Exhibit 8

MOBIL OIL CORPORATION

SOURCE OF DIVIDEND INCOME

Payor Corporation	Mobil's % of stock ownership	Amount of Dividends 1970	1971	1972
Foreign Source Dividend Income				
Foreign Incorporated Subsidiaries Operating In Foreign Countries				
Bayerische Mineral Industrie A.G.	92	$ 329,289	$ 399,672	$ 696,970
Mobil Marine Transportation Limited	100	49,600,000	151,800,000	167,400,000
Mobil Oil Cameroun	100	486,519	358,961	123
Mobil Oil Congo S.C.R.L.	100	269,553		
Mobil Oil de Canarias S.A.	100	580,000		560,606
Mobil Oil de L'Afrique Equatoriale	100	251,389	424,857	267,490
Mobil Oil de L'Afrique Occidentale	100	972,172	1,101,722	1,377,644
Mobil Oil de Mexico S.A.	100	400,000	800,000	749,530
Mobil Oil do Brasil (I.eC.) Ltda.	97	595,546	1,180,952	1,315,019
Mobil Oil Ghana Ltd.	100	175,102		
Mobil Oil Iraq with Limited Liability	100	45,025,000	71,200,000	51,300,000
Mobil Oil Maroc	83	405,642	500,352	396,183
Mobil Oil Oy AB	100	1,028,467	1,057,164	456,407
Mobil Oil Portuguesa S.A.R.L.	100	3,130,006	3,130,142	3,284,506
Mobil Oil Sudan Limited	100	1,758,732		
Pegasus Overseas Limited	100	51,000,000	25,200,000	8,937,900
Compania Anonima de Petroles Socony	100		2,716,955	
Mobil Chemical International S.A.	100		2,450,000	
Mobil Oil Egypt (S.A.A.)	100		704,467	731,259
Mobil Oil Rwanda-Burundi (S.A.R.L.)	100		20,000	20,028
Mobil Oil Zaire	100		529,506	608,454
Mobil Overseas Finance Corporation N.V.	100		200,000	1,134,250
Colombianos Distribuidores de Combustibles, S.A.	74			
Mobil Oil Nigeria Limited	100			1,454,454
Mobil Petroleum Supply Company, S.A.	100			19,421
Mobil Tankers Company S.A.	100			9,100,000
Total		$156,007,917	$263,774,750	$250,419,901

Exhibit 8

MOBIL OIL CORPORATION

SOURCE OF DIVIDEND INCOME

Payor Corporation	Mobil's % of stock ownership	Amount of Dividends 1970	1971	1972
Totals Forward From Page 1		$156,007,917	$263,774,750	$250,419,901
Foreign Incorporated Non-Subsidiaries Operating in Foreign Countries				
C. A. Venezuelano de Dessarollo	Under 5	10,114	9,999	10,219
S. A. Concessionaira de Refinaco de Petroleos en Portugal (S.A.C.O.R.)	Under 5	27,733	28,801	
Societe Afraicaine de Raffinage	12		100,107	36,934
Societe Equatoriale de Raffinage	12		60,495	56,000
Abu Dhabi Petroleum Company Limited	12			976,053
Basrah Petroleum Company Limited	12			1,759,685
Gelsenkirchenerbergawerke A.G.	Under 5			6,207
Monrovia Port Management Co. (Liberia) Ltd.	12			13,000
Qatar Petroleum Company Limited	12			976,054
Total		$ 37,847	$ 199,401	$ 3,834,152
Gross-Up of Foreign Dividends				
Bayerische Mineral Industrie A.G.	72	350,931		
Mobil Marine Transportation Limited	100	3,928		
Total		$ 354,859		
U. S. Incorporated Non-Subsidiaries Operating In Foreign Countries				
Arabian American Oil Company	10	115,132,195	122,085,779	170,149,070
Colombian Petroleum Company	50	1,748,005	249,715	314,042
Mediterranean Refining Company	50	100,000		
South American Gulf Oil Company	50	400,000	250,000	1,122,900
Monrovia Port Management Company	12	27,000		
		117,407,200	122,585,494	171,586,012
Less: 85% Dividend Received Deduction		99,796,120	104,197,670	145,848,110
Total—Net		17,611,080	18,387,824	25,737,902
Total Foreign Source Dividend Income Subjected to Vermont Income Tax		$174,011,703	282,361,975	279,991,955

Exhibit 8

MOBIL OIL CORPORATION

SOURCE OF DIVIDEND INCOME

Payor Corporation	Mobil's % of stock ownership	Amount of Dividends 1970	1971	1972
Totals Forward From Page 2		$174,011,703	$282,361,975	$279,991,956
U. S. Source Dividend Income				
U. S. Incorporated Non-Subsidiaries Operating in the U. S.				
Baltimore Gas & Electric	Under 5	21,600	10,800	
Belridge Oil Company	18	427,016	427,466	320,600
Bank of New York	Under 5	1,092	2,537	2,537
Business Development Corporation of N. C.	"	391	27	27
Cincinnati Gas & Electric	"	3,800	2,137	
Connecticut Gas & Power	"	28,237	26,734	27,484
Canner's Steam Company, Inc.	14	6,408		4,482
Continental Oil and Asphalt Company	Under 5	3	3	3
Dallas Power & Light	"	40,032	20,108	
Dayton Power & Light	"	29,920	14,960	
Duke Power Company	"	28,237	32,182	11,491
Duquesne Light Company	"	18,668	4,150	
Florida Power Corporation	"	22,260	16,355	3,325
General Royalties	"	819	741	741
Gulf States Utilities Company	"	11,250	17,461	20,072
Hartford Electric Light Company	"	2,700	2,010	2,640
Houston Lighting and Power Company	"	84,000	36,288	
Illinois Power Company	"	4,700	3,055	
Monongahela Power Company	"	11,932	5,966	
Natural Gas Pipeline Company	"	3,706		
Northern Indiana Public Service Company	"	9,000	4,480	
Northern State Power Company	"	88,300	69,550	13,300
Pacific Gas and Electric Company	"	10,500	17,139	30,951
Pacific Lighting Corporation	"	18,704	7,867	57,376
Public Service Electric & Gas Company	"	10,560	42,894	63,960
Rochester Gas & Electric Company	"	37,594	38,872	22,125
San Diego Gas & Electric Company	"	3,520	4,840	
Southern California Edison Company	"	31,753	22,458	
Texas Electric Service Company	"	4,760		
Texas Power & Light Company	"	29,250	21,315	7,260
Union Electric Company	"	11,624	5,024	6,400
United Illuminating Company	"	28,125	28,125	
West Penn Power Company	"	33,420	31,773	
Sub-totals Forward		$ 1,063,881	$ 917,317	$ 594,774

Exhibit 8

MOBIL OIL CORPORATION

SOURCE OF DIVIDEND INCOME

Payor Corporation	Mobil's % of stock ownership	Amount of Dividends 1970	1971	1972
Totals Forward From Page 2		$174,011,703	$282,361,975	$279,991,955
U. S. Source Dividend Income				
U. S. Incorporated Non-Subsidiaries Operating in the U. S.				
Sub-totals Forward From Page 3		1,063,881	917,317	594,774
Atlantic City Electric Company	Under 5		2,850	11,400
Brooklyn Union Gas Company	"		2,961	6,020
Delmarva Pipe Line Company	"		35,720	71,440
Detroit Edison Company	"		3,840	42,430
Felix Oil Company	13	1,903	748	
Iowa-Illinois Gas & Electric Company	Under 5		1,870	7,500
Indiana & Michigan Electric Company	"		7,080	10,620
Philadelphia Electric Company	"		2,320	4,640
Public Service Company of Colorado	"		4,375	17,500
Dixie Pipe Line Company	5	63,350		
Cook Inlet Pipe Line Company	20	200,000		
New York Incorporated Corporation				27,980
		1,329,134	979,081	794,304
Less: 85% Dividend Received Deduction		1,129,764	832,219	675,158
Total U. S. Source Dividend Income Subjected to Vermont Income Tax		199,370	146,862	119,146
Grand Total Dividend Income Subjected to Vermont Income Tax		$174,211,073	$282,508,837	$280,111,101
Reconciliation to Amounts Deducted From Vermont Income Tax Returns				
Totals, as above		174,211,073	282,508,837	280,111,101
Gross-Up of Foreign Dividends			308,171	512,303
Amounts Deducted From Vermont Returns		$174,211,073	$282,817,008	$280,623,404

Exhibit 17

(Appellant's Proposed Stipulation of Facts)

[Record of Tax Department—Exhibit 17]
Filed June 27, 1974

WASHINGTON SUPERIOR COURT

WASHINGTON COUNTY, STATE OF VERMONT

Docket No. C 13-74 Wnm

[TITLE OMITTED IN PRINTING]

STIPULATION OF FACTS

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the parties hereto that the following statements shall be accepted as facts for the purpose of this proceeding and all exhibits referred to herein and attached hereto are incorporated in this stipulation and made a part hereof, provided, however, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated. Unless specifically stated to the contrary herein, all facts stipulated are applicable for all the calendar years 1970, 1971 and 1972.

(1) Mobil is a New York corporation authorized to do business in the State of Vermont.

(2) Mobil filed Vermont corporate income tax returns for each calendar year 1970, 1971 and 1972. A true copy of said returns is attached as Exhibits 1, 2 3 respectively.

(3) The aforesaid returns were audited by the Department of Taxes, and assessments for additional tax in the respective principal amounts of $15,078.56, $31,205.52 and $25,359.69, for the years 1970, 1971 and 1972 were made against Mobil. True copies of said assessments are attached hereto as Exhibits 4, 5 and 6.

(4) Timely protests were filed by Mobil with the Commissioner of Taxes from all the aforesaid audit adjustments. A copy of the protest for the year 1972 is attached as Exhibit 7. All contentions made therein shall be deemed applicable to the years 1970 and 1971 as well as the year 1972.

(5) (a) With respect to the calendar year 1970, Mobil reported on its Vermont return its income as shown on line 30 of its U.S. corporation income tax return reduced by the following items: (1) dividends received by it from United States and foreign sources in the amount of $174,211,073 (including gross-up of foreign dividends of $354,859) paid by foreign subsidiary corporations and foreign and domestic nonsubsidiary corporations; (2) interest from United States and foreign sources, other than from U.S. government obligations, in the amount of $10,520,-793; and (3) foreign income taxes in the amount of $12,221,477. On audit the Vermont Department of Taxes disallowed and added back to apportionable income all of the above reductions.

(b) With respect to the calendar year 1971, Mobil reported on its Vermont return its income as shown on line 30 of the U.S. corporation income tax return reduced by the following items: (1) dividends received by it from United States and foreign sources in the amount of $282,817,-008 (including gross-up of foreign dividends of $308,171) paid by foreign subsidiary corporations and foreign and domestic nonsubsidiary corporations; (2) interest from U.S. and foreign sources, other than from U.S. government obligations, in the amount of $12,609,826; and (3) foreign income taxes in the amount of $34,659,576. On audit the Vermont Department of Taxes disallowed and added back to apportionable income all of the above reductions except gross-up on foreign dividends.

(c) With respect to the calendar year 1972, Mobil reported on its Vermont return its income as shown on line 30 of its U.S. corporation income tax return reduced by the following items: (1) dividends received by it from United States and foreign sources in the amount of $280,623,404 (including gross-up of foreign dividends of $512,303) paid by foreign subsidiary corporations and foreign and domestic nonsubsidiary corporations; (2) interest from United States and foreign sources, other than from U.S. government obligations, in the amount of $3,905,208; and (3) foreign income taxes in the amount of $38,260,249. On audit the Vermont Department of Taxes disallowed and added back to apportionable income all of the above reductions except gross-up on foreign dividends.

(6) Mobil is engaged in the petroleum business in the United States, including exploration, production, refining, transportation, distribution and sale of petroleum and petroleum products. In addition Mobil conducts petro-chemical, chemical coatings, plastics and phosphate rock mining businesses in the United States.

(7) Mobil's corporate headquarters, principal place of business and commercial domicile are not in Vermont but are located at 150 East 42nd Street, New York, New York. Mobil's business is not managed, controlled or directed from the State of Vermont.

(8) Mobil does business in all of the states of the United States, the District of Columbia, has a small branch in Greece and engages in interstate and foreign commerce. Mobil is subject to net income taxes or franchise taxes measured by net income imposed by some forty other states and the District of Columbia.

(9) Mobil's only activity within the State of Vermont is the wholesale and retail marketing of petroleum products and related products. Mobil has no refineries or oil or gas production within the State of Vermont.

(10) Mobil owns directly and indirectly capital stock of a large number of foreign subsidiary and domestic and foreign nonsubsidiary corporations. At December 31*st* of each year Mobil owned directly or indirectly capital stock of foreign subsidiary and 5% or more of domestic and foreign nonsubsidiary corporations as follows:

	1970	*1971*	*1972*
Foreign Subsidiary Corporations	203	208	216
Domestic Nonsubsidiary Corporations	26	27	27
Foreign Nonsubsidiary Corporations	185	189	197

(11) The aforementioned capital stocks were held, managed and controlled by Mobil from its offices outside Vermont. Payment of all dividends was received by Mobil outside Vermont and Mobil's control, use and disposition of such dividends were managed and directed from Mobil's offices outside Vermont.

(12) There is attached as Exhibit 8 a schedule of Mobil's dividend income for the years 1970 through 1972 subjected to tax by the assessments of the Department of Taxes of the State of Vermont.

(13) The percentage that Mobil's federal taxable dividends bears to its federal taxable income as shown by line 30 of Mobil's U.S. Corporation Income Tax Returns is as follows:

	Taxable Dividends	*Taxable Income*	*Percentage*
1970	$174,211,073	$220,035,244	79%
1971	$282,817,008	$308,253,570	92%
1972	$280,623,404	$232,825,728	121%

(14) The percentage that Mobil's federal taxable foreign source dividends bears to federal taxable income as shown by line 30 of Mobil's U.S. Corporation Income Tax Return is as follows:

	Taxable Dividends	*Taxable Income*	*Percentage*
1970	$174,011,703	$220,035,244	79%
1971	$282,361,975	$308,253,570	92%
1972	$279,991,955	$232,825,728	120%

Exhibit 17

(15) There are attached as Exhibits 9, 10, 11, 12, 13 and 14 Mobil's Annual Report and Financial and Operating Statistics for the years 1970, 1971 and 1972. Mobil's Annual Report and Financial and Operating Statistics reported the financial results of, and operating statistics regarding the business of Mobil, its United States and foreign operating subsidiaries and, on an equity accounting basis, certain United States and foreign nonsubsidiary "affiliated companies" owned 50% or less. The affiliated companies included in such reports are set forth in Exhibit 15.

(16) As shown in Exhibits 9 through 14, the shareholder's equity (net worth stated on a book basis) of Mobil, its United States operating subsidiaries and United States consolidated affiliates compared with shareholder's equity in Mobil's foreign operating subsidiaries and foreign operating consolidated affiliates was as follows stated in millions:

	1970	*1971*	*1972*
U.S.	$2,513	$2,543	$2,666
Foreign	2,027	2,289	2,479
Total	4,540	4,832	5,145
% Foreign	45%	47%	48%

(17) The number of U.S. employees of Mobil and its U.S. operating subsidiaries compared with the number of foreign employees of Mobil's foreign operating subsidiaries at year end was as follows:

Exhibit 17

	1970	*1971*	*1972*
U.S. Employees	38,900	38,400	38,500
Foreign Employees	36,700	36,900	36,900
Total	75,600	75,300	75,400
% Foreign	49%	49%	49%

(18) The amount (in thousands barrels daily) of net production of crude oil and crude oil gas liquids by Mobil and its sole U.S. oil and gas operating subsidiary (Northern Natural Gas Producing Company) in the United States compared with net production of crude oil and crude oil gas liquids by Mobil's foreign operating subsidiaries and Mobil's share in foreign consolidated affiliates was as follows:

	1970	*1971*	*1972*
U.S.	385	389	394
Foreign	1,188	1,346	1,517
Total	1,573	1,735	1,911
% Foreign	76%	78%	79%

(19) The amount (in thousands barrels daily) of production of natural gas liquids in the U.S. plants of Mobil and its sole U.S. oil and gas operating subsidiary (Northern Natural Gas Producing Company) compared with production of natural gas liquids in the foreign plants of Mobil's foreign operating subsidiaries and Mobil's share in foreign consolidated affiliates was as follows:

Exhibit 17

	1970	*1971*	*1972*
U.S.	62	72	75
Foreign	15	15	18
Total	77	87	93
% Foreign	19%	17%	19%

(20) The amount (in million cubic feet daily) of gross production of natural gas by Mobil and its sole U.S. oil and gas operating subsidiary (Northern Natural Gas Producing Company) compared with gross production of natural gas by Mobil's foreign operating subsidiaries and Mobil's share in foreign consolidated affiliates was as follows:

	1970	*1971*	*1972*
U.S.	2,783	2,853	2,763
Foreign	596	692	832
Total	3,379	3,545	3,595
% Foreign	18%	20%	23%

(21) The amount (in thousands barrels daily) of refinery runs by Mobil in the U.S. compared with foreign refinery runs by Mobil's foreign operating subsidiaries and Mobil's share in foreign consolidated affiliates was as follows:

	1970	*1971*	*1972*
U.S.	818	813	856
Foreign	1,186	1,268	1,378
Total	2,004	2,081	2,234
% Foreign	59%	61%	62%

Exhibit 17

(22) The amount of petroleum products (in thousands barrels daily) sold by Mobil and its U.S. operating subsidiaries in the United States compared with petroleum products sold by Mobil's foreign operating subsidiaries and Mobil's share of sales by foreign consolidated affiliates outside the U.S. was as follows:

	1970	*1971*	*1972*
U.S.	929	948	1,004
Foreign	1,216	1,300	1,405
Total	2,145	2,248	2,409
% Foreign	57%	58%	58%

(23) The number of deep-sea vessels owned or chartered by Mobil versus the number of foreign deep-sea vessels owned or chartered by Mobil's foreign operating subsidiaries and foreign consolidated affiliates was as follows:

	1970	*1971*	*1972*
U.S.	14	9	10
Foreign	110	120	129
Total	124	129	139
% Foreign	89%	93%	93%

(24) The number of chemical plants and facilities owned by Mobil all of which are located in the U.S. compared with the number of foreign plants and facilities owned by Mobil's foreign operating subsidiaries and foreign consolidated affiliates was as follows:

Exhibit 17

	1970	*1971*	*1972*
U.S.	36	36	37
Foreign	13	16	16
Total	49	52	53
% Foreign	27%	31%	30%

(25) None of the corporations listed in Exhibit 8 which are 5% or more owned by Mobil is organized under the laws of Vermont, did business in Vermont, owned or leased property in Vermont, maintained an office in Vermont, had employees in Vermont or derived income from sources in Vermont. With respect to the corporations listed in Exhibit 8 as to which Mobil owns less than 5%, to the best of Mobil's knowledge and information the foregoing statements likewise apply.

(26) More than 99% of the dividends here in issue were received from corporations deriving all or all but an insignificant portion of their income from sources outside the United States.

(27) None of the foreign incorporated subsidiaries or foreign incorporated nonsubsidiaries which are 5% or more owned by Mobil listed in Exhibit 8 did business in the United States, owned or leased property in the United States, maintained an office in the United States, had employees in the United States or derived any income from the United States. With respect to the foreign incorporated nonsubsidiaries listed in Exhibit 8 as to which Mobil owns less than 5%, to the best of Mobil's knowledge and information the foregoing statements likewise apply.

Exhibit 17

(28) The Arabian American Oil Company ("Aramco") is incorporated in the State of Delaware, and derived all of its operating income from sources outside the United States in the conduct of a petroleum business in Saudi Arabia. Mobil owned 10% of the capital stock of Aramco. Aramco received investment income from United States sources which constituted less than one-tenth of one percent of its gross or net income. Aramco conducted no business in Vermont, owned or leased no property in Vermont, maintained no office in Vermont, had no employees in Vermont and derived no income from sources in Vermont.

(29) The Colombian Petroleum Company ("Col. Pet.") is incorporated in the State of Delaware. Mobil owned 49.94% of the capital stock of Col. Pet. Col. Pet. derived all of its income from sources outside the United States in the conduct of a petroleum business in Colombia with the exception of the year 1972. In 1972 Col. Pet. received investment income of $8,321 from United States sources which constituted approximately one-tenth of one percent of its gross income. Col. Pet. conducted no business in Vermont, owned or leased no property in Vermont, maintained no office in Vermont, had no employees in Vermont and derived no income from sources in Vermont.

(30) The South American Gulf Oil Company ("SAGOC") is incorporated in the State of Delaware. Mobil owned 50% of the capital stock of SAGOC. SAGOC derived all of its income from sources outside the United States in the conduct of a pipeline

transportation business in Colombia. SAGOC conducted no business in Vermont, owned or leased no property in Vermont, maintained no office in Vermont, had no employees in Vermont and derived no income from sources in Vermont.

(31) Mediterranean Refining Company ("Med. Ref.") is incorporated in the State of Delaware. Mobil owns 50% of the capital stock of Med. Ref. Med. Ref. had no gross income during the year 1970, the only year here in issue in which it paid dividends to Mobil. It conducted its business in Lebanon of purchasing, refining and selling petroleum and petroleum products. Med. Ref. conducted no business in Vermont, owned or leased no property in Vermont, maintained no office in Vermont, had no employees in Vermont and derived no income from sources in Vermont.

(32) Monrovia Port Management Company, Ltd. was a Delaware corporation during part of the year 1970. Mobil owned 12% of the capital stock of that company. The company derived all of its income from sources outside the United States in the operation of a port in Liberia. The company conducted no business in Vermont, owned or leased no property in Vermont, maintained no office in Vermont, had no employees in Vermont and derived no income from sources in Vermont.

(33) The income of each of the corporations referred to in paragraphs 26 to 32 inclusive was derived to a substantial extent from foreign commerce.

(34) Attached as Exhibit 16 is a schedule showing the interest income of Mobil added back by the assess-

ments in issue. All but a minor portion of said interest income is from certificates of deposit and bank time deposits. The deposits were made with, and the certificates issued by, financial institutions located in the United States and foreign countries; and none of these institutions were located in Vermont. The aforementioned securities and deposits were held, managed and controlled by Mobil from its offices outside Vermont. Payment of all interest in issue was received by Mobil outside Vermont and Mobil's control, use and disposition of such interest income were managed and directed from Mobil's offices outside Vermont.

(35) The book values of the capital stocks and the interest bearing obligations owned by Mobil at December 31 of each year were as follows:

1970	$1,434,287,357
1971	$1,436,624,335
1972	$1,450,156,099

OTTO J. PFALZER
Senior Tax Advisor
Mobil Oil Corporation

JOHN DWIGHT EVANS, JR.
Counsel for
Mobil Oil Corporation

Dated:
November 8, 1973

MOTION FILED
FEB 6 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

v.

COMMISSIONER OF TAXES OF VERMONT,

Appellee,

On Appeal from the Supreme Court the State of Vermont

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT AND BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

Committee on State Taxation of the Council of State Chambers of Commerce

GEORGE S. KOCH
Counsel
499 South Capital Street, SW
Suite 412
Washington, DC 20003

PRESS OF BYRON S. ADAMS, INC., WASHINGTON, D.C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION,
Appellant,

v.

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

On Appeal from the Supreme Court of the State of Vermont

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

The Committee on State Taxation of the Council of State Chambers of Commerce hereby respectfully moves for leave to file the attached brief *amicus cruiae* in this case. The consent of the Attorney for the Appellant has been obtained. The consent of the Attorney for the Appellee was requested and refused.

The Council of State Chambers of Commerce (COUNCIL), organized in 1932, consists of 33 Chambers of Commerce (29 state and 4 regional Chambers). The Committee on State Taxation (COST), one of three advisory committees of the COUNCIL, consists of 136 corporate members which conduct a substantial portion of the interstate and international business of the United States. One of COST's principal activities has been to work with the states and others toward developing fair and equitable national standards in the income allocation and apportionment aspects of state taxation.

Member companies of COST are thus representative of that part of the nation's business sector which is most directly affected by state taxation of interstate and international business operations. COST is therefore vitally interested in cases such as this one which present issues significantly affecting the uniformity, certainty and fair apportionment of state and local taxes.

The particular interest of COST in this case is that it presents the following substantial question:

> Whether the Due Process Clause of the Fourteenth Amendment or the Commerce Clause of the Constitution of the United States was violated when Vermont levied its income tax on dividends received by Mobil Oil Corporation ("Mobil"), a New York corporation with a New York commercial domicile, where:
>
> (1) the dividends were received and their control, use and disposition were managed and directed, and the capital stocks on which the dividends were paid were held, managed and controlled, by Mobil from its New York offices;

> (2) most of the dividends were derived from foreign source earnings of payor corporations; and
>
> (3) the only connection between Mobil and Vermont was the sale of a small percentage of its products in that state.

The United States Supreme Court has never decided the pure legal question of whether a state can impose an income tax on foreign source* dividends (i) received by a corporation which is organized elsewhere and which has its commercial domicile elsewhere; (ii) from stocks held, managed and controlled elsewhere; and (iii) which are received, controlled, managed, used and disposed of elsewhere ("Unrelated Foreign Dividends").

The issue in the case at hand is not burdened by factual problems. The record shows that Mobil was engaged in interstate and foreign commerce during the years involved. In the United States its principal business was the exploration, production, refining, transportation, distribution and sale of petroleum and petroleum products. In Vermont its only activity was the wholesale and retail marketing of a small percentage of its pertoleum products and related products. Mobil was subject to net income taxes or franchise taxes measured by net income imposed by Vermont, approximately 40 other states and the District of Columbia.

---

* Most of the dividends at issue are from foreign sources. Since the inconsistent state taxation of foreign source dividends is so important to United States corporation, this motion and brief will concentrate on the foreign aspects of the disputed assessment.

Mobil owned the capital stocks of a large number of United States and foreign corporations. Dividend income was the major source of its Federal taxable income. The record shows that in all respects Mobil's activity as the owner of the stocks was conducted, managed and directed at its offices outside Vermont. All dividends were received there and Mobil's control and use of the dividends were managed and directed there.

More than 99% of the dividends at issue were from sources outside the United States. The amounts of disputed Unrelated Foreign Dividends are approximately $174,000,000 for 1970, $282,000,000 for 1971 and $280,000,000 for 1972.* Vermont is attempting to tax an apportionable share of these Unrelated Foreign Dividends without even taking the payors' property, sales and payroll into account for an equitable apportionment.

It is our understanding that hundreds of state income tax cases are pending on the dockets of state courts and administrative tribunals throughout the country. The principal issue in many of those cases is whether the taxing state can tax Unrelated Foreign Dividends of a corporation domiciled in another state.

Establishment by this Court of Constitutional standards for fair taxation of such dividends is urgently needed. It is needed to unclog those dockets. It is needed to prevent inequity. It is needed to maintain a fair system of taxation throughout the nation in this era of rapidly increasing state and local revenue demands.

---

* See Exhibit 8 of the record.

By this motion COST seeks leave (1) to show that the decision of the Supreme Court of Vermont is contrary to the rule of fair taxation, as developed by the Court under the Due Process and Commerce Clauses of the Constitution, and (2) to show the national and detrimental effect that the decision will have, unless the Court undertakes to resolve the conflict between the fair apportionment standard and the increasing efforts of state tax collectors to maximize tax revenue from multistate businesses by taxing extraterritorial Unrelated Foreign Dividends.

COST therefore urges that leave be granted to file a brief as *amicus curiae* and respectfully so moves the Court.

Respectfully submitted,

GEORGE S. KOCH
Counsel
499 South Capitol Street, SW
Suite 412
Washington, D.C. 20003

Attorney for the Committee on State Taxation of the Council of State Chambers of Commerce

February, 1979

INDEX

Page

INTRODUCTORY STATEMENT 1

OPINIONS BELOW 2

INTEREST OF AMICUS CURIAE 2

Argument

A) The Need for Constitutional Standards 2

B) Unrelated Foreign Dividends 10

CONCLUSION 16

CITATIONS

CASES:

Austin v. *New Hampshire*, 420 U.S. 656, 666 (1975) 14

Chestnut Securities Co. v. *Oklahoma Tax Commission*, 125 F.2d 571 (10th Cir. 1942) 12

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 14

Connecticut General Life Insurance Co. v. *Johnson*, 303 U.S. 77 (1938) 11

Curry v. *McCanless*, 307 U.S. 357 (1939) 12

Fargo v. *Hart*, 193 U.S. 490, 499-500 (1904) ... 12

First Bank Stock Corp. v. *Minnesota*, 301 U.S. 234 (1937) 12

Page

General Motors Corp. v. *Washington*, 377 U. S. 436 (1964) 14

General Trading Co. v. *State Tax Commission*, 322 U.S. 335 (1944) 14

Hans Rees' Sons, Inc. v. *North Carolina*, 283 U.S. 123, 134 (1931) 10

International Harvester Co. v. *Department of Treasury*, 322 U.S. 340 (1944) 14

International Harvester Co. v. *Evatt*, 329 U.S. 416 (1947) 14

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940) 14

McLeod v. *Dilworth Co.*, 322 U.S. 327, 349, 358 (1944) 14

Moorman Manufacturing Co. v. *Bair*, 98 S. CT. 2340 (1978) 7

Nashville, C & St. L. R. Co. v. *Browning*, 310 U.S. 362, 365 (1940) 12

National Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753, 756 (1967) 10

Norfolk & Western R. Co. v. *Missouri*, 390 U.S. 317, 325 (1968) 10, 12

Northwestern States Portland Cement co. v. *Minnesota*, 358 U.S. 450 (1959) 2, 14

Pembina Consolidated Silver Mining and Milling Co. v. *Pennsylvania*, 125 U.S. 181 (1888) 11

Underwood Typewriter Co. v. *Chamberlain, 254 U.S. 113 (1920)* *11*

Page

Western Live Stock v. *Bureau of Revenue*, 303 U.S. 250, 256 (1938) 14

Wheeling Steel Corp. v. *Fox*, 298 U.S. 193 (1936) 12

MISCELLANEOUS:

Carlson, "State Taxation of Corporate Income from Foreign Sources", *Essays in International* Taxation; 1976, Department of the Treasury, Washington, D.C. (1976), pages 284-301 3

Garrison, "Toward A Consensus on Apportionable v. Allocable Income", *28 The Tax Executive 41* (October, 1975) 3

House of Representatives Special Subcommittee on State Taxation of Interstate Commerce, Vol, I, June 15, 1964, pages 598-599 8

Pierce, *35 Taxe—The Tax Magazine*, 749 (1957) 5

U.S. Constitution

Commerce Clause 8, 10, 13

Due Process Clause 10, 11

Fourteenth Amendment 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION,
Appellant,

v.

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

On Appeal from the Supreme Court of Vermont

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

I. INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of the Jurisdictional Statement in the above-captioned case.

II. OPINIONS BELOW

Findings of fact and conclusions of law by the Commissioner of Taxes of the State of Vermont are found in the Commissioner's unreported Determination of Appeal, dated April 11, 1974, which is set forth in Appendix A of Appellant's Jurisdictional Statement. An opinion of the Washington County Superior Court reversing the Commissioner's determination and holding in favor of the appellant is contained in that court's unreported January 6, 1977 order and its unreported June 9, 1977 final order, which are set forth in Appendix B of Appellant's Jurisdictional Statement. The decision from which the appeal was taken is the order of the Vermont Supreme Court reversing the decision of the Superior Court. The order and Opinion of the Vermont Supreme Court, which have not yet been reported, are set forth in Appendix C of Appellant's Jurisdictional Statement.

III. INTEREST OF AMICUS CURIAE

The interest of the Committee on State Taxation of the Council of State Chambers of Commerce is set forth in the accompanying Motion for Leave to File Brief *Amicus Curiae*.

IV. ARGUMENT

A. The Need for Constitutional Standards

It has been twenty years since this Court issued its famous precedent on the Constitutional limits on a state's power to tax the income of an out-of-state corporation doing business within the state and admittedly subject to its taxing jurisdiction in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959). During that twenty-year period the inconsistent taxation of Unrelated Foreign Dividends has emerged as one of the most pressing problems in the state income tax area.

The problem is serious and growing. For example, 1972 corporate income tax returns reported foreign source dividends in excess of $2,700,000,000.00 (Carlson, "State Taxation of Corporate Income for Foreign Sources," *Essays in International Taxation*; 1976, Department of the Treasury, Washington, DC, (1976), pages 284-301). The current number is probably much higher. This multi-billion dollar number is the amount in dispute year after year in most of our states.

Cases often "appear" to turn on the factual question of whether disputed dividends are "business" income or "unitary" in nature. In the end, the central question is really the issue involved in the case at bar—do states have the the right to include Unrelated Foreign Dividends in the apportionable base?

Dividends on investments have traditionally been allocated for purposes of state corporate income taxation to the state where the recipient has its corporate domicile.

The background of this historical method of taxing dividends and the current attempt to change that method by zealous tax collectors were summarized in Garrison, "Toward a Consensus on Apportionable v. Allocable Income", 28 *The Tax Executive* 41 (October, 1975), as follows (footnotes omitted):

> "The problem of dividing the total net income of a multistate firm among the states entitled to impose a tax on it has existed ever since Wisconsin enacted the first modern state net income tax

in 1911. For all those years this problem has been the subject of study and comment.

* * *

The National Tax Association has wrestled with the problem of allocation and apportionment for more than a half century. As early as 1922, an NTA committee recommended specific allocation of interest, dividends, rents, and royalties to their geographic source. Their report declared: 'They form no part of the trading profit and do not need to be apportioned by formula since they can readily be specifically allocated to their proper sources'.

In 1957, the National Conference of Commissioners on Uniform Laws adopted the Uniform Division of Income for Tax Purposes Act (commonly referred to as UDITPA), which has since been enacted by over half the states. Under UDITPA, non-business income is allocated, item by item, to each appropriate state according to the situs of the item. All of the remaining income is then labeled business income and is apportioned, according to a three-factor formula, among the states with jurisdiction to tax such income.

Business income is defined in UDITPA as income arising from transactions and activity in the regular course of the taxpayer's trade or business, including income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

The classes of income which are to be specifically allocated under UDITPA, if they do not constitute business income for the taxpayer, are dividends, interest, rents and royalties, and capital gains.

At the time UDITPA was adopted, the statutes and administrative practices for most of the states required direct allocation to specific states of dividends, royalties, and interest income especially where such income had not arisen in the main course of the taxpayer's trade or business. There was a rather extensive body of case law and literature in support of this traditional legal position. The framers of UDITPA were aware of these precedents and practices but, as indicated by Sections 4 through 8 of the Act, they evidently preferred to make no radical departure from existing law and administrative practices with respect to allocation and apportionment.

Professor William J. Pierce, the principal draftsman of the Uniform Act (UDITPA), has indicated that the distinction between business and nonbusiness income in the act was intended to codify the existing pattern of legislation. In an article in 35 *Taxes—The Tax Magazine* 749 (1957), Professor Pierce stated:

> 'Sections 4 through 8 of the act provide for the allocation of four types of non-business income to specific states, rather than apportionment on the basis of a formula. The reason for this treatment, which is representative of the existing pattern of legislation, is that it is felt that these items of income can appropriately be attributed to a specific state.'

* * *

The push for full apportionment of all income by formula perhaps had its origin in 1966 with the so-called Interstate Taxation Bill (H.R. 11798, 89th Cong., 2d Sess.), which was introduced in Congress soon after the publication of the Willis committee report. Under this so-called Willis bill, the entire income, both business and

nonbusiness, had to be divided among the states by a uniform apportionment formula. This radical departure from the prevailing practice with respect to allocation was one of the most controversial parts of the Willis bill.

The momentum for Congressional legislation starting with the Willis bill caused the formation in 1967 of the Multistate Tax Compact, a confederation of 21 states created primarily for the purpose of blocking the enactment of any federal legislation with respect to the interstate tax problem. Article IV of the Compact adopts the Uniform Act (UDITPA) as its rules governing allocation and apportionment. However, the Multistate Tax Commission, which is created under the Compact, adopted regulations in 1971 requiring virtual full apportionment of all income, irrespective of the class of income or its geographic source. Sections 4 through 8 of the Uniform Act (UDITPA) were simply read out of the statute by regulation. The Commission's regulations instead reflect the view that all of a corporation's interstate taxable income is business income and should, therefore, be apportioned.

Most of our states and the District of Columbia now impose corporate taxes measured by net income which includes dividends in some manner. (See Appendix F of the Appellant's Jurisdictional Statement) Only three exclude foreign source dividends. Seven states "allocate" dividends (*i.e.*, the state taxes 100% of the dividends if it is the recipient corporation's commercial domicile state and it taxes none of the dividends if it is not the commercial domicile state). Eighteen states (*e.g.*, the UDITPA states) and the District of Columbia supposedly follow the same rule of allocation to commercial domicile if dividends are "nonbusiness" income. However, as advocates of the

Multistate Tax Commission creed that "*all* income is business income",* tax administrators in many of these states automatically classify all dividends as "business" income and attempt to have them apportioned even though the taxpayer's commercial domicile is elsewhere. Eight states apportion all dividends under their formulas, regardless of the location of the taxpayer's commercial domicile. Four states apply various hybrid methods of taxing dividends. It is thus apparent that virtually all corporations engaged in interstate and foreign commerce are subject to risks of multiple state taxation of their Unrelated Foreign Dividends.

This Court is well aware of the inconsistent tax treatment afforded dividends by the various states. In *Moorman Manufacturing Co.* v. *Bair*, 98 S. Ct. 2340 (1978), the Court observed in footnote 15:

> "one State in which a corporation does business may consider a particular type of income business income and simply include it in its apportionment formula; a second State may deem that same income nonbusiness income and attribute it to itself as the 'commercial domicile' of the company; and a third State, though also considering it nonbusiness income, may attribute it to itself as the 'legal domicile' of the company."

The *Moorman* Opinion stated that although this Court is aware that the "potential for attribution of the same income to more than one State is plain", it

* At its May 4, 1977 Annual Meeting, the Multistate Tax Commission adopted a Resolution which provides that "it is the policy of the Multistate Tax Commission * * * that each state which imposes a tax on or measured by corporate income seek * * * to apply formulary apportionment to all income * * *".

believed that the prevention of duplicative taxation requires national uniform rules for the division of income—rules that can be enacted because of the legislative power granted to Congress by the Commerce Clause. In refusing to grant the Moorman Manufacturing Company relief, this Court advised that "It is to that body, and not this Court, that the Constitution has committed such policy decisions".

COST agrees that Congress should enact fair national uniform rules for the division of income and COST appreciates this Court's continued urging of Congress to legislate in this area. However, after many years of following legislative attempts to adopt such rules, it has been our experience that rapid Congressional action in this area cannot be expected. In 1964, after three years of intensive study and hearings by the House of Representatives Special Subcommittee on State Taxation of Interstate Commerce, the Subcommittee stated in Volume 1 of its June 15, 1964 Report (at pp. 598 and 599):

> "Today the businessman is placed on the horns of a dilemma. He may file returns wherever due and precisely as due, at costs which would often completely overshadow the amount of tax involved. Or he may live under the threat of litigation, back liabilities, interest, and penalties. The resulting situation is as unsatisfactory for the tax administrator as it is for business.
>
> Nor does the future hold out any prospect of improvement. The number of income tax jurisdictions increases. Laws seem to become more complex rather than less. Improved enforcement procedures may add taxpayers to the rolls, but still it is inconceivable that they can make any substantial impact on much of the noncompliance which has been observed in this report. To the extent that such an enforcement effort does produce literal compliance, it can only result in accentuating the inequities which now permeate the system. Looked at in terms of its operation today, or its potential problems tomorrow, the impact of the State and local income tax system on interstate commerce gives cause for serious concern.
>
> Fifty years ago, as the first of the States adopted the income tax, forward-looking tax men warned of the dangers of each State taxing interstate commerce in its own way. For 50 years, state tax administrators have been discussing ways of achieving simplicity and uniformity. One proposal after another has been formulated, discussed, revised, and in spite of the expenditure of enormous efforts, discarded. And, today, the States appear to be as far from a solution as they have ever been. In short, the history of 50 years of State income taxation leaves no room for optimism that the States will be any more successful in the future than they have been in the past."

It is now fifteen years later and there is less room for optimism for a legislative solution today than there was in 1964. It is therefore evident that the business community's problem of non-domicile states attempting to tax Unrelated Foreign Dividends will continue to confront this Court, state courts and administrative tribunals until the outer limits of state taxing power in this area are established by this Court.

COST believes that the time has come for this Court to resolve this problem and establish a Constitutional standard for business and tax administrators. Sixty-five years of disputing the question of whether a nondomicile state can tax Unrelated Foreign Dividends is far too long.

The Mobil case presents a timely opportunity for this Court to consider the application of the Due Process Clause and the Commerce Clause to this question. The legal issue is not burdened by factual problems. COST therefore strongly urges the Court to accept this opportunity.

Our specific views on the two issues in the instant case are as follows:

B. Unrelated Foreign Dividends

1. The Due Process Clause

The role of the Due Process Clause in state income tax controversies was explained in *Moorman* as follows:

> "The Due Process Clause places two restrictions on a State's power to tax income generated by the activities of an interstate business. First, no tax may be imposed unless there is some minimal connection between those activities and the taxing State. *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 756. This requirement was plainly satisfied here. Second, the income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing state'. *Norfolk & Western R. Co.* v. *Missouri*, 390 U.S. 317, 325."

The second restriction is the one pertinent to the case at hand. If the Unrelated Foreign Dividends are not rationally related to values connected with Vermont, the dividends cannot be taxed because of the long-standing Constitutional doctrine that a state cannot tax income which is "in no just sense attributable to transactions within its jurisdiction". *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U.S. 123, 134

(1931). See *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (1920).

The Fourteenth Amendment to the Constitution provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." As corporations are "persons" within the meaning of the Fourteenth Amendment (*Pembina Consolidated Silver Mining and Milling Co.* v. *Pennsylvania*, 125 U.S. 181 (1888)), it follows that states cannot compel corporations to pay taxes without due process.

In *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U.S. 77 (1938), where California was prevented from imposing its gross premium tax on a Connecticut corporation's non-unitary, non-California reinsurance contracts, Justice Stone discussed the applicability of the Due Process Clause to state tax matters as follows:

> "[T]he limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But *the due process clause denies to the state power to tax or regulate the corporations's property and activities elsewhere.*" (Emphasis added; 303 U.S. at 80-81.)

Norfolk & Western R. Co. v. *Missouri State Tax Commission*, 390 U.S. 317, 325 (1968), reaffirmed this Court's prohibition against extraterritorial taxation when it stated:

> "The Taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due. A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to 'project the taxing power of the state plainly beyond its borders'. *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U.S. 362, 365 (1940). Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State. *Fargo* v. *Hart*, 193 U.S. 490, 499-500 (1904)." (Footnotes omitted.)

The Constitutional rule which determines the situs of Unrelated Foreign Dividends is "*mobilia sequuntur personam*" (*i.e.*, movables follow the person). They are "localized at the owner's domicile for purposes of taxation" since they do not have a "business situs" in another state. *Wheeling Steel Corp.* v. *Fox*, 298 U.S. 193 (1936); *First Bank Stock Corp.* v. *Minnesota*, 301 U.S. 234 (1937); *Curry* v. *McCanless*, 307 U.S. 357 (1939); *Chestnut Securities Co.* v. *Oklahoma Tax Commission*, 125 F.2d 571 (10th Cir. 1942), *cert. denied*, 316 U.S. 668 (1942).

COST respectfully submits that the *mobilia* standard should be applied herein to prevent Vermont from projecting its taxing power beyond its borders to tax the Unrelated Foreign Dividends.

2. The Commerce Clause

The applicability of the Commerce Clause to cases of this nature was explained by Justice Powell in his dissent in *Moorman* as follows (citations and footnotes are omitted):

> "It is a basic principle of Commerce Clause jurisprudence that '[n]either the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of the residents'.* * * Those barriers would consititute' an unreasonable clog upon the mobility of commerce'.* * *
>
> One form of such unreasonable restrictions is 'discriminating State legislation'.* * * This Court consistently has struck down state and local taxes which unjustifiably benefit local businesses at the expense of out-of-state businesses. ***
>
> This ban applies not only to state levies that by their terms are limited to products of out-of-state business, or which explicitly tax out-of-state sellers at higher rates than local sellers. It also reaches those taxes that 'in their practical operation work discriminatorily against interstate commerce to impose upon it a burden, either in fact *or by the very threat of its incidence*'." (Emphasis added.)

The principle that a tax is not Constitutionally permissible when the very *threat* of its incidence works discriminatorily against interstate commerce is the heart of this Court's long-standing Multiple Taxation Doctrine, *i.e.*, that state taxes cannot subject interstate or foreign commerce to a *risk* of multiple taxa-

tion not borne by intrastate commerce. *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940); *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340 (1944); *International Harvester Co.* v. *Evatt*, 329 U.S. 416 (1947). The "risk" element is predicated upon the *power* of another state to tax the interstate or foreign income, even if that power is not exercised. See *Western Live Stock* v. *Bureau of Revenue, supra*, 303 U.S. at 256, and Mr. Justice Rutledge's single opinion in *McLeod* v. *Dilworth Co.*, 322 U.S. 327, 349, at 358 (1944); *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335 (1944); *International Harvester Co.* v. *Department of Treasury, supra*; and *Austin* v. *New Hampshire*, 420 U.S. 656, 666 (1975).

When the target of multiple taxation is Unrelated Foreign Dividends, the importance of the Multiple Taxation Doctrine is elevated to its highest level because of the continual national policy of avoiding multiple taxation of foreign source earnings (See the Revenue Acts of 1918, 1921, 1924 and 1926, Sec. 222 and 238; the Revenue Acts of 1928, 1932, 1934, 1936 and 1938, IRC of 1939, Sec. 131; and Secs. 901-904 of the IRC of 1954).

The Vermont Supreme Court stated in the opinion below that it believes that the Multiple Taxation Doctrine has been replaced by a requirement of *actual* multiple taxation. The Vermont court cites *Moorman*, *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964), and *Northwestern States Portland and Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959).

While the majority Opinion in *Moorman* does state in footnote 11 that "Since there is no evidence in the record regarding the percentages of its total net income taxed in the other States in which it did business during those years, any claim that appellant was taxed on more than 100% of its total net income would also be speculative", COST believes that the continued existence or nonexistence of the Multiple Taxation Doctrine—at least with respect to Unrelated Foreign Dividends—is so important that it should be the subject of analysis and briefing by the parties to this case. The Doctrine has been a significant factor in business planning for more than forty years. It should not be overruled by a footnote's implication.

For this reason alone, COST believes that this case should be the vehicle for the Court's clarification of the present status of the Multiple Taxation Doctrine.

CONCLUSION

For all of the foregoing reasons, COST urges this Court to note probable jurisdiction in the present case and give plenary consideration to the Due Process Clause and Commerce Clause questions discussed in Appellant's Jurisdictional Statement.

Respectfully Submitted.

GEORGE S. KOCH
Counsel
499 South Capitol Street, SW
Suite 412
Washington, DC 20003

Attorney for the Committee on State Taxation of the Council of State Chambers of Commerce

February, 1979

Supreme Court, U. S.
FILED
MAR 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1201

MOBIL OIL CORPORATION,

Appellant

v.

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

On Appeal From The Supreme
Court of Vermont

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Gregory A. McKenzie
Deputy Attorney General
Pavilion Office Building
Montpelier, VT 05602
Attorney for the Appellee

Of Counsel:
Richard Johnston King
The Valley Professional Center
Waitsfield, VT 05673

March 5, 1979

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement Opposing Jurisdiction and Motion to Dismiss or Affirm ..	1
Statement of the Case	2
Argument	
I. Mobil did not properly raise in the proceedings before the Vermont Supreme Court its claim that the Vermont tax was imposed on extra-territorial values in violation of the Due Process Clause	7
II. Mobil did not properly raise in the proceedings below its claim that the foreign source of the dividends at issue is a fact of constitutional significance under the Commerce Clause..	12
III. The federal question properly raised and decided in the proceedings below --does the Vermont Tax unconstitutionally discriminate against interstate commerce by including in net income before apportionment, Mobil's dividend income--is not substantial	15
Conclusion	27

TABLE OF AUTHORITIES

Cases: Page

Allen v. Vermont Employment Security Board, 133 Vt. 166, 333 A.2d 122 (1974) 10

Central Union Co. v. Edwardsville 269 U.S. 190, 194-5 (1925) 8

F.M.Burlington Company--Mondev Burlington, Inc. d/b/a Burlington Square v. Commissioner of Taxes 134 Vt. 515, 365 A.2d 531 (1976) ... 10

Harvey v. Waitsfield (Decision handed down Feb. 14, 1979). 10, 11

In re: Smith, Bell & Hauck Real Estate, Inc. 132 Vt. 295, 318 A.2d 183 (1974) ... 12

In re: Wright 131 Vt. 473, 490, 310 A.2d 1, 10 (1973) 12

Moorman Manufacturing Co. v. Bair 437 U.S. 267 (1978) 17, 23, 24, 27

Northfield v. Chittenden Trust Co. 128 Vt. 240, 241, 260 A.2d 406 (1969) 11

Northwestern States Portland Cement Co. v. Minnesota 358 U.S. 450 (1959) 19

Pennsylvania R. Co. v. Illinois Brick Co. 297 U.S. 447, 462-3 (1936)..... 8

Page

Standard Pressed Steel Co. v. Department of Revenue of Washington, 419 U.S. 560 (1975) 17, 23

State v. Brown 121 Vt. 459, 69 A.2d 879 (1960)..... 10

Tellarico v. Brett (Decision handed down Feb. 6, 1979).. 12

Tunbridge v. Young (Order filed Oct. 30, 1978) 10

Western Livestock, et al v. Bureau of Revenue, at al 303 U.S. 250 (1938) 18

Rules of the United States Supreme Court:

Rule 15 7

Vermont Rules of Appellate Procedure:

V.R.A.P. 3 9
V.R.A.P. 4 ..... 9, 10

Vermont Statutes:

32 V.S.A. §5811(18) 2
32 V.S.A. §5833 ..... 3, 13
32 V.S.A. §1431 8

United States Code:

28 U.S.C. §1257 1

Page

United States Constitution:

Article 1, Section 8,
Clause 3 15

Other Authorities:

State Taxation of Interstate Business and the Multi-State Tax Compact: The Search for a Delicate Uniformity, 11 Columbia Journal of Law and Social Problems, 231, 269 (1975). 22

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
No. 78-1201

MOBIL OIL CORPORATION,
Appellant

v.

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

On Appeal from the Supreme Court of Vermont

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Commissioner of Taxes of Vermont, the Appellee, submits this statement in opposition to jurisdiction in this Court of the above-captioned cause. The Jurisdictional Statement submitted by Mobil Oil Corporation, the Appellant, invokes jurisdiction under 28 U.S.C. §1257(2). The Appellee opposes jurisdiction based on the decisions and rules of this Court which limit jurisdiction to substantial federal questions which have been properly raised

in the proceedings below. The Appellant's claims of extra-territorial taxation in violation of the Due Process Clause and taxation of foreign commerce in violation of the Commerce Clause were not properly raised in the proceedings below. The Appellant's claim that the tax in dispute exposed its dividend income to the risk of multiple taxation and, therefore, discriminated against interstate commerce in violation of the Commerce Clause, does not raise a substantial federal question.

For the foregoing reasons, the Appellee moves this Court for an order dismissing this cause, or in the alternative, affirming the decision below.

STATEMENT OF THE CASE

Vermont imposes an annual tax on the apportioned net income of every corporation, domestic and foreign, doing business in Vermont. A corporation's taxable income for federal income tax purposes, with certain adjustment not here in issue, is treated as its Vermont net income.[1]

[1] 32 V.S.A. §5811(18), reproduced as part of Appendix E to Appellant's Jurisdictional Statement, at page 35a.

If a corporation's business is not conducted entirely within Vermont, the Statute imposes a tax only on that portion of its net income which fairly and equitably reflects its business activities in Vermont.[2]

Vermont uses the standard three-factor formula which apportions net income on the basis of property, payroll and sales. Specifically, the percentage of net income which is apportioned to business activities in Vermont is calculated as the arithmetic average of the percentages of a corporation's total payroll, property and sales which are attributable to business activities in this State.[3] The Vermont tax is imposed on a corporation's net income apportioned to Vermont. For example, if the arithmetic average of Mobil's payroll, property and sales attributable to its marketing activities in Vermont was 1%, then 1% of its net income would be apportioned to and taxed by Vermont.

[2] 32 V.S.A. §5833, reproduced as part of Appendix E to Appellant's Jurisdictional Statement, at pages 35a and 36a.

[3] Id.

The facts are not in dispute. Mobil is a New York corporation which markets petroleum and related products in Vermont. For the years in question, the Vermont Department of Taxes correctly determined: (a) the amount of Mobil's Vermont net income (federal taxable income); (b) the amount of Mobil's total property, payroll and sales; (c) the percentages of Mobil's property, payroll and sales attributable to business activities in Vermont; (d) the arithmetic average of Mobil's property, payroll and sales attributable to business activities in Vermont; and (e) an apportionment of Mobil's net income to Vermont which fairly reflected its business activities in Vermont.

The sole question before this Court is whether the Commerce Clause precludes Vermont from including in net income dividends included in Mobil's taxable income for federal purposes. While Mobil admits, on the one hand, that the Vermont tax was imposed only on that portion of its net income which fairly reflected its business activities in Vermont, it argues, on the other hand, that dividends

are entitled to special protection under the Commerce Clause, and, therefore, must be excluded from its net income for Vermont tax purposes.

For the tax years 1970, 1971 and 1972, Mobil filed Vermont income tax returns reporting as its net income, federal taxable income, reduced by the amount of dividends received from subsidiary and non-subsidiary corporations.[4] The Department of Taxes added back to Mobil's net income the amounts of improperly excluded dividends, applied Mobil's calculated apportionment factor to its actual net income and assessed the Vermont tax on that part of Mobil's net income apportioned to Vermont.[5] Mobil appealed that assessment to the Commissioner of Taxes (the "Commissioner"). The Commissioner upheld

---

[4]Mobil also excluded from net income reported to Vermont other component items of net income not here in dispute.

[5]Additional adjustments were made by the Department of Taxes which are not here in issue.

the assessment.[6] Mobil appealed the Commissioner's Determination to the Washington Superior Court which held that the assessment subjected Mobil's dividend income to a risk of multiple taxation forbidden by the Commerce Clause.[7] The Commissioner appealed the decision of the Washington Superior Court to the Vermont Supreme Court. Mobil filed no notice of appeal from the decision of the Washington Superior Court.

---

[6]The Determination of Appeal is reproduced as Appendix A to Appellant's Jurisdictional Statement, at pages 1a through 13a.

[7]The Orders of the Washington Superior Court, dated January 6, and June 9, 1977, are reproduced as Appendices B and C to Appellant's Jurisdictional Statement, at pages 14a through 18a. Mobil raised additional issues in the proceedings before the Commissioner and the Washington Superior Court which are not here in issue.

In the proceedings before the Vermont Supreme Court, the sole issue properly raised and decided was whether the record supported the Superior Court's decision that the Vermont tax exposed Mobil's dividend income to a risk of multiple taxation forbidden by the Commerce Clause.

ARGUMENT

I. MOBIL DID NOT PROPERLY RAISE IN THE PROCEEDINGS BEFORE THE VERMONT SUPREME COURT ITS CLAIM THAT THE VERMONT TAX WAS IMPOSED ON EXTRA-TERRITORIAL VALUES IN VIOLATION OF THE DUE PROCESS CLAUSE.

This Court has consistently refused to accept jurisdiction except over substantial federal questions which were properly raised in the proceedings below. Rule 15 requires that:

> "1. The jurisdictional statement required by paragraph 2 of Rule 13 shall contain:
>
> (d)....If the appeal is from a state court, the statement of the case shall also specify the stage in the proceedings in the court of first instance, and in the appellate court,

at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them...; and the way in which they were passed upon by the court;...."

Whether a federal question was properly raised in the proceedings below is determined by state practice. Central Union Co. v. Edwardsville, 269 U.S. 190, 194-5 (1925); Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447, 462-3 (1936).

It is well-established law in Vermont that the timely filing of a notice of appeal is a prerequisite to creating appellate jurisdiction. The Vermont Rules of Appellate Procedures clearly state this jurisdictional requirement:

"Except as provided in this subdivision, an appeal permitted by law as of right shall be taken by filing a notice of appeal with the clerk of the [Superior] or District Court and paying to him any entry fee required under 32 V.S.A. §1431 within the time allowed by Rule 4. Failure of an appellant to take any step other than

the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal." V.R.A.P. 3(b)

"In any civil or criminal case in which an appeal is permitted by law as of right, the notice of appeal required by Rule 3 shall be filed with the clerk of the [Superior] or District Court within 30 days of the date of the entry of the judgment or order appealed from....If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires...." V.R.A.P. 4

The Reporter's notes to V.R.A.P. 3 state, in part:

"[Rule 3(a)] makes clear that appeal under these rules is the sole means of review of a lower court judgment...."

The Reporter's notes to V.R.A.P. 4 state, in part:

> "Rule 4(a),..., provides that the notice of appeal must be filed within 30 days of the entry of judgment. Filing of a timely notice gives other parties an additional 14 days in which to file cross appeals,...."

The Vermont Supreme Court has consistently held that the timely filing of a notice of appeal is a prerequisite to creating appellate jurisdiction. Harvey v. Waitsfield, (Decision handed down February 14, 1979); Tunbridge v. Young, (Order filed October 30, 1978); F. M. Burlington Company -- Mondev Burlington, Inc. d/b/a Burlington Square v. Commissioner of Taxes, 134 Vt. 515, 365 A.2d 531 (1976); Allen v. Vermont Employment Security Board, 133 Vt. 166, 333 A.2d 122 (1974); State v. Brown, 121 Vt. 459, 69 A.2d 879 (1960).

The Vermont Supreme Court most recently articulated this requirement in the following terms:

> "Since this Court has many times held that failure to file the notice of appeal within the prescribed time period deprives the tribunal appealed to of jurisdiction over the appeal,

> Northfield v. Chittenden Trust Co., 128 Vt. 240, 241, 260 A.2d 406 (1969), it goes without saying that an entire failure to file a notice of appeal must also foreclose such review." Harvey v. Waitsfield, (Decision handed down February 14, 1979.)

Because Mobil filed no notice of appeal to the Vermont Supreme Court from the decision of the Washington Superior Court, appellate jurisdiction over any claim it might have asserted lapsed on July 9, 1977, 30 days after the entry of that decision. Therefore, Mobil's claim that it raised the issue of extra-territorial taxation in violation of the Due Process Clause in the proceedings below is totally without merit. Mobil's contention that it revived appellate jurisdiction by making the self-serving claim in its brief to the Court below that it did not intend to waive that claim, is also without merit. It is respectfully suggested that an untimely unilateral assertion of jurisdiction cannot create jurisdiction.

Even if Mobil had created appellate jurisdiction over its Due Process claim in the Vermont Supreme Court, it nonetheless failed to properly raise that issue in the proceedings before that Court. The Vermont Supreme Court has consistently held that it will not consider issues not briefed and argued. Tellarico v. Brett, (decision handed down February 6, 1979); In re: Smith, Bell & Hauck Real Estate, Inc., 132 Vt. 295, 318 A.2d 183 (1974); In re: Wright, 131 Vt. 473, 490, 310 A.2d 1, 10 (1973).

Therefore, it is respectfully submitted that for the foregoing reasons Mobil failed to properly raise its claim of extraterritorial taxation in violation of the Due Process Clause in the proceedings below.

II. MOBIL DID NOT PROPERLY RAISE IN THE PROCEEDINGS BELOW ITS CLAIM THAT THE FOREIGN SOURCE OF THE DIVIDENDS AT ISSUE IS A FACT OF CONSTITUTIONAL SIGNIFICANCE UNDER THE COMMERCE CLAUSE.

The Washington Superior Court held simply that the Vermont tax exposed

Mobil's dividends to a prohibited risk of multiple taxation, the Superior Court attributed no constitutional significance to the foreign source of the earnings from which those dividends were paid. Accordingly, Mobil's failure to appeal from the decision of the Washington Superior Court foreclosed appellate jurisdiction in the Vermont Supreme Court.[8]

Mobil's failure to properly raise both the Due Process issue and the foreign source income--Commerce Clause issue is clearly reflected in the decision below, which states the proceedings and the issue presented, as follows:

> "Mobil appealed the deficiencies to the Commissioner under the provisions of 32 V.S.A. §5833(b). A hearing was held at which time Mobil asserted that the assessments violated the terms of the tax statute, 32 V.S.A. §5833, the Due Process Clause of the Fourteenth Amendment, and the Interstate and Foreign Commerce Clause of Article

[8] See, generally, cases cited in Argument I at pages 7 through 12, supra.

I, Section 8 of the United States Constitution. The Commissioner rejected all grounds of invalidity asserted and affirmed the action of the Department of Taxes.

Upon appeal, the superior court reversed on the sole ground that the tax as applied violated the prohibition against multiple taxation contained in the Commerce Clause. As the superior court correctly noted in its order, the legal questions concerning apportionment and due process had already been answered adversely to Mobil's contentions by recent decisions of this Court. (Citations omitted.)

The single question presented here is: Does Vermont's application of its apportioned net income tax to the investment income in issue constitute multiple taxation prohibited by the Commerce Clause?"[9] (Emphasis added.)

---

[9]The opinion of the Vermont Supreme Court is reproduced as Appendix C to Appellant's Jurisdictional Statement, at pages 19a through 29a. The portion quoted above begins on page 21a.

III. THE FEDERAL QUESTION PROPERLY RAISED AND DECIDED IN THE PROCEEDINGS BELOW--DOES THE VERMONT TAX UNCONSTITUTIONALLY DISCRIMINATE AGAINST INTERSTATE COMMERCE BY INCLUDING IN NET INCOME BEFORE APPORTIONMENT, MOBIL'S DIVIDEND INCOME--IS NOT SUBSTANTIAL.

Mobil asserts that its dividend income could be taxed by New York, without apportionment. Therefore, Mobil argues Vermont's law which includes its dividends in net income exposes that income to a risk of multiple taxation. This risk of multiple taxation, Mobil asserts, would discriminate against interstate commerce because the dividend income of an intrastate business would be exposed to no such risk. Such discrimination, Mobil argues, violates the Commerce Clause.

Article 1, Section 8, Clause 3 of the United States Constitution provides that Congress shall have the power "to regulate commerce with foreign Nations and among the several States,...." This Court has interpreted the Commerce Clause as prohibiting state taxes which interfere with or discriminate against interstate commerce.

An inherent conflict exists between the taxing powers and revenue needs of the states and the national interest in promoting a strong national economy by encouraging the free flow of commerce among the states. The decisions of this Court have, of necessity, made practical adjustments in attempting to balance these competing interests.

Although clearly a burden on interstate commerce, state taxes imposed on the unapportioned gross receipts from business activities in the taxing state, or net income apportioned to fairly reflect business activities in the taxing state, have been held constitutional. It is apparent that the risk of multiple taxation and therefore discrimination is inherent in any tax based on the net income of an interstate business, because the same income may be included in the tax base of more than one state. This risk applies equally to all types of income included in net income. To the extent that the same net income is included in the tax base of

more than one state, this Court has held that the resulting discrimination is constitutional if the particular tax in question is imposed only on that portion of net income which fairly reflects business activities within the taxing state. Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978). This Court has also held acceptable under the Commerce Clause the risk of multiple taxation present where income of a multistate business is subject to both unapportioned gross receipts taxes and apportioned net income taxes or net income taxes using different methods of apportionment. Id.; Standard Pressed Steel Co. v. Department of Revenue of Washington, 419 US. 560 (1975).

The constitutional test of a tax on unapportioned gross receipts is the source of income sought to be taxed. Such taxes are constitutional only if limited to income directly related to business activities within the taxing

state. The rationale for this constitutional limitation is that any particular component item of income is directly related to business activities in only one state and, therefore, not exposed to the risk of multiple taxation.

> "The vice characteristic of those [gross receipts] taxes which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed (Citations omitted) or added to (Citations omitted) with equal right by every State which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause, it would bear cumulative burdens not imposed on local commerce.[10]

The constitutionality of taxes on apportioned net income is determined by the apportionment of that income. Such taxes are constitutionally valid, if net

---

[10] Western Livestock, et al v. Bureau of Revenue, et al, 303 U.S. 250 (1938).

income is apportioned to fairly reflect business activities within the taxing state. The rationale underlying this constitutional test is that apportionment results in allocating each portion of net income to business activities which are local to only one state. As stated by this Court:

> "Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice."[11]

Net income merely defines all income subject to tax, without regard to what portion of that income is taxable by any particular state. Apportionment, on the other hand, determines what portion of net income is taxable by each state.

This Court has clearly held that the Commerce Clause permits a State to tax the local activities of an interstate business and to impose its tax on fairly apportioned net income. Mobil argues that the Commerce Clause requires an

---

[11] Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

additional limitation, a type of income test, superimposed on the fair apportionment test appropriate to a tax on net income. This argument is not supported by the decisions of this Court, logic, or common sense. This argument also conveniently ignores the reality that income, without regard to type, is integral to the economic and financial structure and operation of a multistate business.

Mobil asserts that New York, its chosen state of commercial domicile, could constitutionally tax its dividend income, without apportionment. This Court has never held that a state of commercial domicile can tax, without apportionment, the dividend income of a multistate corporation. In view of the competition for corporate headquarters among the states, that case is not likely to be presented for decision. As one commentator has noted:

> "Logically, states such as New York, Pennsylvania, and Massachusetts, which provide corporate domiciles for a preponderance of U.S. Corporations,

> should oppose the [Multistate Tax Commission] because of the Commission's decision to apportion, rather than allocate, most dividend income. However, if these domiciliary states oppose the change from allocation to apportionment of dividends, it is not because of any potential loss of revenue from dividend taxation. Indeed, Pennsylvania and Massachusetts do not even tax such dividends, while New York taxes only a portion. Major domiciliary states have found that ultimately it is more profitable to lure interstate businesses to settle in the state than to tax their dividend income. As an incentive for corporations to locate within them, these states deliberately treat such income specially. Therefore, such states might oppose apportionment of dividends on the theory that this tax incentive would be diluted if they were forced to exempt only their apportioned part of the dividends, rather than total dividends. Even this theory, however, is undercut in

practice: Massachusetts has chosen to apportion dividends, and effectively New York does so. Thus, while businesses still seem united in their desire that dividends be allocated to the state of commercial domicile, the apportionment of such income is probably not a determinative factor of the domiciliary states' coolness toward the MTC."[12]

Although the Appellant's conclusion that the Commerce Clause requires an allocation of 100% of dividend income to the state of commercial domicile is speculative, at best, and economic realities foreclose likelihood that New York will tax 100% of its dividend income, Mobil contends that Vermont's tax on an admittedly fair portion of its net income, including dividends, must be struck down as unconstitutional. Broadly stated, the rule proposed is that the Commerce

[12]Note, State Taxation of Interstate Business and the Multi-State Tax Compact: The Search for a Delicate Uniformity, 11 Columbia Journal of Law and Social Problems, 231, 269 (1975).

Clause precludes a state from including in net income, before apportionment, any component item of income which could be taxed, without apportionment, by another state. The implications of Mobil's argument are far reaching. This Court has already endorsed the validity of a tax on unapportioned gross receipts and net income apportioned by a single factor.[13] Because all states have the constitutional authority to impose such taxes, the economic viability of a tax on the net income of a multistate corporation apportioned to fairly reflect business activities in the taxing state, would effectively be eliminated by Mobil's argument.

Mobil contends that the Vermont Supreme Court held that proof of actual multiple taxation is a sine qua non to the invocation of the multiple taxation doctrine.[14] While it is respectfully sugges-

[13]Standard Pressed Steel Co. v. Department of Revenue of Washington, 419 U.S. 560 (1975); Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978).

[14]Jurisdictional Statement, at pages 6 and 7.

ted that even the holding suggested by Mobil would be constitutional under this Court's decision in Moorman, a fair and careful reading of the opinion below reveals a far narrower holding. Specifically, the Vermont Supreme Court held:

> "We do not decide this issue in the case at bar since Mobil has failed to establish on the record that New York has the power to tax investment income without apportionment and hence no risk of multiple taxation is here shown."[15]

The Court below did not hold that Mobil had to prove that New York in fact taxed 100% of its dividend income. It never reached that issue because Mobil failed to establish that the Commerce Clause would permit New York to tax 100% of its dividend income without apportionment.

Mobil has failed to show on the record before this Court that its dividend income was exposed to double taxation. In Moorman, on the other hand, the taxpayer established an actual overlap in the

---

[15] Jurisdictional Statement at page 24a. See also, supra, at pages 13 and 14.

taxation of its gross income arising from sales in the taxing state. As to the adequacy of this showing, this Court said:

> "In the first place, this record does not establish the essential factual predicate for a claim of duplicative taxation. Appellant's net income during the years in question was approximately $9 million. Since appellant did not prove the portion derived from sales to Iowa customers, rather than sales to customers in other States, we do not know whether Illinois and Iowa together imposed a tax on more than 100% of the relevant net income. The income figure that appellant contends was subject to duplicative taxation was computed by comparing gross sales in Iowa to total gross sales. As already noted, however, this figure does not represent actual profits earned from Iowa sales. Obviously, all sales are not equally profitable. Sales in Iowa, although only 20% of gross sales, may have yielded a much higher percentage of appellant's profits. Thus, profits from Iowa sales may well have exceeded

the $2.5 million figure that appellant contends was taxed by the two States. If so, there was no duplicative taxation of the net income generated by Iowa sales. In any event, on this record its existence is speculative.

Even assuming some overlap, we could not accept appellant's argument that Iowa, rather than Illinois, was necessarily at fault in a constitutional sense." Moorman Manufacturing Co. v. Bair, 437 U.S. 267, 276 (1978).

It is respectfully suggested that the record before this Court contains no showing of a risk of multiple taxation which discriminates against interstate commerce in a constitutional sense. Under this Court's decision in Moorman, the Vermont tax at issue is well within the permissible constitutional limits imposed by the Commerce Clause. Accordingly, it is respectfully suggested that the question presented by Mobil's multiple taxation claim has been foreclosed by prior decisions of this Court.

CONCLUSION

Mobil failed to properly raise in the proceedings below its claim of extraterritorial taxation in violation of the Due Process Clause and its claim that the foreign source of the dividends at issue is of constitutional significance under the Commerce Clause. Mobil's claim that the Vermont tax exposed its dividend income to a risk of multiple taxation prohibited by the Commerce Clause fails to raise a substantial federal question. For the foregoing reasons, the Appellee's Motion to dismiss this cause or, in the alternative, to affirm the decision below, should be granted.

Dated at Waitsfield, County of Washington and State of Vermont, this 5th day of March, 1979.

Respectfully submitted,

Gregory A. McKenzie
Attorney for Appellee

Of Counsel:

Richard Johnston King

Supreme Court, U. S.
FILED
MAR 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—VS.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

JEROME R. HELLERSTEIN
80 Pine Street
New York, New York 10005
(212) 344-1279

JOHN DWIGHT EVANS, JR.
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017
(212) 883-4965

Attorneys for Appellant

Of Counsel:

WILLIAM B. RANDOLPH
80 Pine Street
New York, New York 10005

March 19, 1979

TABLE OF CONTENTS

ARGUMENT— PAGE

The Appellant Properly Raised in the Court Below the Due Process and Commerce Clause Challenges to the Vermont Tax Relied on Before This Court 1

CONCLUSION 5

TABLE OF CASES

Braune v. *Town of Rochester*, 126 Vt. 527, 237 A.2d 117 (1967) 2

Goupiel v. *Grand Trunk Ry. Co.*, 94 Vt. 337, 111 A. 346 (1920) 2

Hall v. *Hall*, 124 Vt. 410, 206 A.2d 786 (1965) 2

Horicon v. *Langlois' Estate*, 115 Vt. 81, 52 A.2d 888 (1947) 2

In re: Smith, Bell & Hauck Real Estate, Inc., 132 Vt. 295, 318 A.2d 183 (1974) 2

In re: Wright, 131 Vt. 473, 310 A.2d 1 (1973) 2

Lane Construction Corp. v. *State*, 127 Vt. 287, 248 A.2d 508 (1968), appeal after remand, 128 Vt. 421, 265 A. 2d 441 (1970) 2

Milne v. *Capital City Gas Co.*, 129 Vt. 308, 276 A.2d 632 (1971) 2

Sexton v. *Greer*, 135 Vt. 343, 376 A.2d 750 (1977) 2

Tellarico v. *Brett* (Decision handed down Feb. 6, 1979) 2

Thompson v. *Smith*, 119 Vt. 488, 129 A.2d 638 (1957) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—VS.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

The Appellant Properly Raised in the Court Below the Due Process and Commerce Clause Challenges to the Vermont Tax Relied on Before This Court.

(a)

The appellee contends that because the appellant did not appeal to the Vermont Supreme Court from the decision of the Washington Superior Court in its favor, it is now precluded from challenging the tax at issue under the Due Process Clause.

This argument is without merit and is not supported by any case cited by the appellee. Most of the cases cited merely hold that an appellant to the Vermont Supreme Court must file a timely notice of appeal to give that court

appellate jurisdiction. (See cases, Appellee's St. pp. 10-11). The three cases that do not fall in that category all involved appeals by the party that had lost below, and hold that the appeal of the losing party must be confined to the issues "raised by the brief of the appellants." (*In re: Smith, Bell & Hauck Real Estate Inc.*, 132 Vt. 295, 300, 318 A.2d 183, 187 [1974]; *Tellarico* v. *Brett*, [decision handed down February 6, 1979]; *In re: Wright*, 131 Vt. 473, 490, 310 A.2d 1, 10 [1973]).

The established Vermont law is that a litigant that has obtained a judgment below for all the relief it seeks cannot appeal. Thus, in *Thompson* v. *Smith*, (119 Vt. 488, 129 A.2d 638 [1957]), the court held that "[a] party may not appeal from a decree in his favor for the purpose of obtaining a review of a finding he deems erroneous which is not necessary to support any part of the decree made by the Chancellor." (119 Vt. at 511, 129 A.2d at 652; *accord*, *Hall* v. *Hall*, 124 Vt. 410, 206 A.2d 786 [1965]; *Lane Construction Corp.* v. *State*, 127 Vt. 287, 248 A.2d 508 [1968], appeal after remand, 128 Vt. 421, 265 A.2d 441 [1970]; *Milne* v. *Capital City Gas Co.*, 129 Vt. 308, 276 A.2d 632 [1971]).

The prevailing party, may, nevertheless, on appeal by the losing party, urge any ground on the appeal in support of the Superior Court's decision in its favor. (*Horicon* v. *Langlois' Estate*, 115 Vt. 81, 52 A.2d 888 [1947]; *Goupiel* v. *Grand Trunk Ry. Co.*, 94 Vt. 337, 111 A. 346 [1920]; see *Sexton* v. *Greer*, 135 Vt. 343, 376 A.2d 750 [1977]; *Braune* v. *Town of Rochester*, 126 Vt. 527, 237 A.2d 117 [1967]).

In the instant case, the Superior Court held that the inclusion by the Commissioner of Taxes, for apportionment purposes, of appellant's foreign source dividends was unconstitutional, because "such income could be the subject of prohibitive multiple taxation" (Jur. St., App. B, pp. 15a-16a). In the final order from which the Commissioner

appealed to the Vermont Supreme Court, all of appellant's foreign source dividends were eliminated from the tax as recomputed in accordance with the decision of the Superior Court. (Id., App. B, pp. 17a-17b). Consequently, on the appeal to the Vermont Supreme Court, the appellant (as appellee before that court) was entitled under the Vermont law to make any contention that might support that decision, including the contention that the inclusion of the foreign source dividends in the tax base for apportionment purposes would contravene the Due Process Clause of the 14th Amendment.

In point of fact, in presenting its case to the Vermont Supreme Court, the appellant cited in support of the judgment of the Superior Court both the Due Process and Commerce Clause challenges to the validity of the tax on which it here relies in its Jurisdictional Statement. The facts relevant to the raising of the Due Process issue are set out in the Jurisdictional Statement, p. 3.

(b)

The appellee concedes that the appellant challenged the tax under the Commerce Clause before the Vermont Suprem Court, and that that court passed on the question as to whether "Vermont's application of its apportioned net income tax to the investment income at issue constitute multiple taxation prohibited by the Commerce Clause". (Appellee's St., p. 14.). Since most of the "investment income" consisted of dividends derived from foreign sources (Jur. St. p. 5), there can be no question that the appellant argued before the Vermont Supreme Court that the tax on its foreign source dividends violated the Commerce Clause, or that its contention was rejected by that court. Appellee's contention, therefore, comes down to the narrower, highly strained argument that, because the Superior Court, in

setting aside the tax as violating the Commerce Clause "attributed no constitutional significance to the foreign source of the earnings from which the dividends were paid", (Appellee's St. p. 13), and the appellant did not appeal the decision in its favor, we are not now in a position to make a Commerce Clause argument before this Court that gives constitutional significance to the foreign source of the dividends.

The Vermont cases cited above clearly establish that the appellant, as the winning litigant, was not required to and, indeed, could not appeal to the State Supreme Court the grounds on which the foreign dividend issue was decided in its favor. On the Commissioner's appeal, however, as permitted by the State's law, the appellant did argue in the Vermont Supreme Court that the foreign source character of the dividends taxes had "constitutional significance", to use appellee's term, under the Commerce Clause. Point B-4 of appellant's brief in the Vermont Supreme Court (there the appellee) made the following contention:

> 4. Because the dividends at issue were paid by corporations that conducted their business and derived virtually all their income from foreign sources, the risks of multiple taxation of the dividends are increased in the case at bar, in contravention of the Foreign Commerce Clause. (Br. p. 18).

Accordingly, in reversing the Superior Court and holding that the Commerce Clause was not violated by the imposition of the tax on the appellant's dividends derived from foreign sources, the Vermont Supreme Court necessarily rejected that contention. Hence, both the Due Process and Commerce Clause questions presented to this

Court in the Jurisdictional Statement were properly raised by appellant before the Vermont Supreme Court and were passed on by that tribunal.

CONCLUSION

The motion to dismiss or affirm should be denied and probable jurisdiction of the appeal should be noted by this Court.

Dated: March 19, 1979

Respectfully submitted,

JEROME R. HELLERSTEIN
80 Pine Street
New York, New York 10005
(212) 344-1279

JOHN DWIGHT EVANS, JR.
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017
(212) 883-4965

Attorneys for Appellant

Of Counsel:

WILLIAM B. RANDOLPH
80 Pine Street
New York, New York 10005

MOTION FILED
MAR 6 1979

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1201

MOBIL OIL CORPORATION
Appellant,

v.

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

On Appeal From the Supreme Court of Vermont

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, AS *AMICUS CURIAE,* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA
BY THOMAS J. HOUSER
General Counsel

JAN S. AMUNDSON
Assistant General Counsel

1776 F Street, N.W.
Washington, D.C. 20006

INDEX

		Page
I.	Motion for Leave to File Brief *Amicus Curiae*	1
II.	Brief *Amicus Curiae*	4
III.	Opinions Below	4
IV	Interest of *Amicus Curiae*	5
V.	Summary of Argument	5
VI.	Argument	
	A. The Commerce Clause Prohibits Interference in Foreign Commerce, which Includes the Prohibition of Multiple Taxation	7
	B. Inclusion of Foreign Source Dividends in the Tax Base of a State Without the Requisite Nexus, Violates the Due Process Clause of the Constitution	11
	C. *Moorman v. Bair* is Distinguishable	13
	D. Use of *Moorman* Rationale Precludes the Inclusion of the Funds in the State Apportionment Formula	14
VII.	Conclusion	15

LIST OF AUTHORITIES

	Page
CASES	
Boston Stock Exchange v. State Tax Commissioner, 429 U.S. 318 (1977)	8
Chestnut Securities Co. v. Oklahoma Tax Commission, 125 F. 2d 571 (10th Cir., 1942), *cert. denied*, 316 U.S. 668 (1942)	8
International Harvestor Co. v. Evatt, 329 U.S. 416 (1947)	10
International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944)	10
McGoldrick v. Berwind—White Coal Mining Co., 309 U.S. 33 (1940)	10
Miller Bros. Co. v. Maryland, 347 U.S. 340 (1978)	11
Moorman Manufacturing Co. v. Bair, ___U.S. ___(1978), 46 U.S.L.W. 4703 (June 15, 1978)	7,13,14
National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967)	8,11
Norfolk & Western R.R. Co. v. Missouri Tax Commissioner, 390 U.S. 317 (1968)	12,14
Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959)	6,8
Pacific Telephone and Telegraph Company v. Franchise Tax Board, 102 Cal. Reptr. 782, 498 P. 2d 1030 (1972)	8
Southern Pacific Company v. McColgan, 68 Cal. App. 2d 48, 156 P. 2d 81 (1945)	8
United Gas Corporation v. Fontenot, 241 La. 488, 129 So. 2d 81 (1945)	8
Western Live Stock v. Bureau of Revenue, 303, U.S. 250 (1938)	10

	Page
CONSTITUTION:	
Commerce Clause, United States Constitution, Art. I, § 8 cl. 3	7
Due Process Clause, United States Constitution, Amendment XIV	11
STATUTES:	
Internal Revenue Code	
§ 243	10,13
§ 901-902	10
OTHER AUTHORITIES:	
Appellants' Jurisdictional Statement	4,5,9
Carlson, *State Taxation of Corporate Income from Foreign Sources, Essays in International Taxation, 1976*, Department of the Treasury, Washington, D.C.	10

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1201

MOBIL OIL CORPORATION,
Appellant,

v.

COMMISSIONER OF TAXES OF VERMONT
Appellee.

On Appeal from the Supreme Court of the State of Vermont

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

The National Association of Manufacturers hereby respectfully moves for leave to file the accompanying brief as *amicus curiae* in this case. The consent of the Attorney for the Appellant has been obtained. The consent of the Attorney for the Appellee has been denied as the Appellee intends to oppose jurisdiction.

The National Association of Manufacturers (NAM) is a non-profit voluntary business association incorporated under the laws of the State of New York. The NAM has a membership of approximately 12,400 manufacturing and related business concerns representing an estimated 78% of all employees engaged in manufacturing nationwide. Further, of the member companies, a significant percentage have foreign subsidiaries and operations which provide foreign source income.

This case presents an opportunity for the Court to determine the narrow issue regarding the taxability for state income tax purposes of Appellant's, Mobil Oil Corporation (Mobil), dividend income derived from Appellant's ownership of the capital stock of foreign subsidiaries, totally disassociated from the company's retail activities within the taxing state. The resolution of this question is imperative when this issue is placed in the context of other states which apportion tax liability. Appellant is not challenging the authority of Vermont to tax their intrastate or interstate activities, nor is this a challenge to the theory of apportionment employed by the State of Vermont. Rather, this case presents a challenge to the inclusion of specific foreign source dividends. The Court has never addressed this specific concept which has broad ramifications.

The NAM represents the interests of many companies similar to Appellant, which are located in the forty-six states which have a state corporate income tax. NAM is critically concerned with the issue presented in this case which questions whether this foreign source dividend income can be included in the apportionable tax base for state income tax purposes. A substantial number of our members could be adversely affected if this decision is affirmed, particularly in the event other states choose to include unrelated foreign source dividends in their apportionment formulas. The inclusion of these dividends

in the tax base constitutes an exercise of taxing authority in violation of the Due Process and Commerce Clauses of the Constitution.

Based upon the diverse membership base of the NAM, it is our belief that our filing a brief as *amicus curiae* will offer a broadened perspective in the ultimate determination of this appeal.

Accordingly, the NAM urges that leave be granted to file the accompanying brief as *amicus curiae* and respectfully so moves this Court.

Respectfully submitted,

NATIONAL ASSOCIATION OF
MANUFACTURERS OF THE
UNITED STATES OF AMERICA

By Thomas J. Houser
General Counsel

Jan S. Amundson
Assistant General Counsel

1776 F Street, NW
Washington, DC 20006

IN THE

Supreme Court of the United States

OCTOBER, TERM 1978

No. 78-1201

MOBIL OIL CORPORATION,
Appellant,

vs

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

On Appeal from the Supreme Court of Vermont

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Determination of the Commissioner of Taxes of the State of Vermont dated April 11, 1974, is Appendix "A" to Appellant's Jurisdictional Statement, (State-

ment). Appendix "B" of the Statement is the January 6, 1977, unreported opinion of the Washington County Superior Court. The opinion of the Supreme Court of Vermont from which the Appeal was taken has not yet been reported, however, the opinion is Appendix "C" to the Appellant's Jurisdictional Statement.

INTERESTS OF AMICUS CURIAE

The interests of the National Association of Manufacturers (NAM) are set forth in the accompanying Motion for Leave to File Brief *Amicus Curiae.*

SUMMARY OF ARGUMENT

During the years 1970, 1971, and 1972, Mobil Oil Corporation (Mobil), a New York corporation, was engaged in interstate and foreign commerce. During these years Mobil paid Vermont corporate income tax based upon a three factor formula, the tax base of which was derived from Mobil's retail activity within the State. In 1972 the Vermont Commissioner of Taxes assessed a deficiency predicated on a violation of the applicable taxing statute which was interpreted to create a tax base inclusive of monies received as dividend income from foreign sources, namely subsidiaries of Mobil. Mobil had excluded these dividends from their taxable income.[1]

---

[1] Appellant's Jurisdictional Statement, Appendix "C", Opinion of Vermont Supreme Court, p.1 where the Court interprets the state tax law as it applies to the tax base. "The statute applies the misleading term 'Vermont net income' to the income base against which the tax is assessed. The term might seem to indicate that the tax base is composed only of income allocable to business activities within the state, when in fact the term refers to a corporation's total net income before any allocation." The opinion recognizes, that from the face of the statute, Mobil's computation would have been reasonable and accurate.

Originally Mobil appealed the Commissioner's decision in the Washington County Superior Court. Mobil successfully challenged the Commissioner's Determination, alleging that only the state of commercial domicile can tax the foreign source dividends. The Court ruled that the tax as it applied was violative of the Commerce Clause of the United States Constitution in that it violated the prohibition against multiple taxation contained in that clause.

On appeal to the Vermont Supreme Court, the decision was reversed. The Court determined on appeal that the only question presented was whether Vermont's application of its apportioned net income tax formula to the investment income in question constituted multiple taxation prohibited by the Commerce Clause. The Court determined that based on prior case law this type of tax had already been sanctioned and there was no showing of multiple taxation offensive to the Constitution.

The Commerce Clause of the Constitution prohibits multiple taxation of interstate commerce and encourages the free flow of foreign commerce in our enterprise system. There is precedent which favors the state of commercial domicile as the appropriate jurisdiction for the allocation for the taxing of foreign source investment income.

It is settled that the state has the authority to tax a concern which carries on business within its borders based upon an apportioned tax formula given the requisite nexus between the state and the business activities.

> Net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing state forming sufficient nexus to support the same.

Northwestern States Portland Cement Co. v. Minnesota 358 US 450, 452 (1959).

In the case at bar, the Appellant has demonstrated that the requisite nexus between the state and these monies in question does not exist. Hence, inclusion of these funds in the Vermont tax base is violative of the Due Process Clause of the Constitution.

The recent decision of the United States Supreme Court in *Moorman Manufacturing Co. v. Bair*, ____U.S. ____, 46 U.S.L.W. 4703, (June 15, 1978) is not dispositive of the situation presented in this case. In *Moorman*, the Court declined to rule on the Iowa method of apportionment. In the instant case, Appellant acknowledges the validity of the apportionment formula. The challenge before this Court goes to the precise question of whether specific dividends from foreign sources should be included in the tax base.

Should the Court rule favorably on the ability of a state to include foreign source dividend income in the tax base for allocation, the requisite nexus for inclusion must be present. In this instance the existence of retail outlets for sale of Mobil's products in the State of Vermont does not satisfy this requirement.

ARGUMENT

THE COMMERCE CLAUSE PROHIBITS INTERFERENCE IN FOREIGN COMMERCE, WHICH INCLUDES THE PROHIBITION OF MULTIPLE TAXATION

Art. I §8, Cl. 3 of the United States Constitution provides, "The Congress shall have power . . . to regulate commerce with foreign Nations and among the several States, and with the Indian Tribes."

Initially, the instant case raises the issue as to the extent of a State's authority over foreign commerce, whether Congress in its wisdom has deigned to enact controlling legislation or not. It is basically a national policy question which by reference to Constitutional language appears to be within the province of the Congress.[2] In *National Belias Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 760 (1967) the Court reasoned that, "the very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control."

In *Boston Stock Exchange v. State Tax Commissioner* 429 U.S. 318, 328 (1977) the opinion states, "It is now established beyond dispute that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States." Thus, this case provides an opportunity to establish the limits of a state's ability to burden foreign commerce without a valid basis for such an action. Historically, any conflict with multiple taxation of foreign source income has been resolved by allocating the income to the state of commercial domicile. There have been lower courts which have sustained allocation rather than apportionment.[3] In the opinion of the Vermont Supreme Court the argument is raised as to whether credence should be given to these cases, as two of

[2] *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 456 (1958).

[3] Chestnut Securities Co. v. Oklahoma Tax Comission, 125 F. 2d 571 (10th Cir., 1942), cert, denied, 316 U.S. 668 (1942; Southern Pacific Company v. McColgan, 68 Cal. App.2d 48, 156 P. 2d 81 (1945); United Gas Corporation v. Fontenot, 241 La. 488, 129 So. 2d 748 (1961); Pacific Telephone and Telegraph Company v. Franchise Tax Board, 102 Cal. Reptr. 782, 498 P. 2d 1030 (1972).

the cases cited by Mobil were decided thirty years ago, the Commerce Clause was mentioned in only one of the cases, and the subject statutes were different from the apportionment issue presented in this case.[4]

These are not compelling arguments. The fact that a decision is over thirty years old does not render it any less controlling absent a reversal, superceding legislation, or Constitutional mandate. The cases provide an analagous situation upon which an argument can be based, despite direct reference to the Commerce Clause. It is the taxation concept, not the tax computation or formula which makes the differing tax statutes comparable. Indeed, at the end of the Vermont Court's opinion the Court states, "Congress or the United States Supreme Court may ultimately have to decide on the power of the states to tax on such a basis, but neither has done so yet."[5] This statement favors this appeal as recognized by the Vermont Supreme Court.

Absent this defined approach, a multinational company could be constantly subjected to multiple taxation by varied state formulas. This presents a substantial federal question in view of the prohibition against multiple taxation.

In this case, the Vermont Supreme Court has taken an unwarranted approach to their inclusion of the foreign source income in their tax formula. They claim that there was no actual showing of multiple taxation by another state, hence there is no prohibition to their taxing these funds.[6] This is inappropriate in light of express Constitutional prohibitions against double or multiple tax-

[4] Appellant's Jurisdictional Statement, Appendix "C", pp. 23a-23b.

[5] Ibid., p. 24a.

[6] Ibid., 23a.

ation as interpreted by case law.[7] The nexus or link is the only justification for imposition of a tax on interstate business. In the case at bar, the state where the dividends were received and controlled would be the allocable taxing jurisdiction. This is the state where any services or values attributable to these monies were provided. The fact that the jurisdiction with a requisite nexus has not taxed these monies, does not eliminate the protection from double taxation when another state attempts to apportion the income. This is the protection the Constitution extends.

Further, there is no *quid pro quo* to the requirement that foreign source dividends be included in the state apportionment formulas. The State of Vermont has no exemptions or credits on any taxes heretofore paid on these funds. Indeed, the federal government allows a deduction of certain dividends, (I.R.C. § 243) and creditability for foreign taxes paid, (I.R.C. §§ 901-902). The state taxation of foreign source income offers another federal policy consideration.

> The new issue raised by state taxation of foreign income is whether this tax base should be reserved to the Federal government. It might be argued that to the extent foreign source income is taxed at all, it should be taxed for the benefit of all the people of the United States and not for the benefit of a particular state. The income is earned abroad and does not depend upon, or benefit from, state protection or expenditures.[8]

---

[7] Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940); International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944); International Harvester Co. v. Evatt, 329 U.S. 416 (1947).

[8] Carlson, "State Taxation of Corporate Income From Foreign Sources", Essays in International Taxation: 1976, Department of the Treasury, Washington, D.C. (1976), p. 254.

A Court sanction of this inclusion in state apportionment formulas could have vast consequences where potentially all states could require the monies to be included in their tax base without a consequential relationship between the income and the tax. This is an untenable threat of multiple taxation which is entirely contrary to the Commerce Clause, and thus presents a substantial federal question suitable for this Court's review.

INCLUSION OF FOREIGN SOURCE DIVIDENDS IN THE TAX BASE OF A STATE WITHOUT THE REQUISITE NEXUS, VIOLATES THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

Amendment XIV, § 1 of the United States Constitution is as follows: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." On this authority the states are prohibited from indiscriminately taxing interstate commerce. In *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344 (1954), the Court refers to a "consistent adherence to one time honored concept: that due process requires some definite link, some minimal connection, between a state and the person, property, or transaction it seeks to tax." In *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 756 (1967), the Court recognizes that the "simple but controlling question is whether the state has given anything for which it can ask return."

In taxing any property it is imperative that the state establish this requisite link and cannot claim taxing authority based upon some self-serving formula.

> The taxation of property not located in the taxing state is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the

> taxpayer the process that is his due. A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise to "project the taxing power of the state plainly beyond its borders."

Norfolk & Western RR Co. v. Missouri Tax Commissioner, 390 U.S. 317, 325 (1968):

Indeed, Mobil has acknowledged a tax due to Vermont and has complied with the three factor formula applied to domestic income to correctly reflect that amount of income allocable to the business activity from Mobil's retail stations in Vermont. The salient factor, however, is that Mobil excluded the foreign source dividends from the formula to reach the tax base for Vermont taxing purposes. The monies received by Mobil from foreign sources bear no relationship to the State of Vermont. The monies were generated outside of the continental United States; they were received and controlled in a sister state, and there is no connection between the retail business in Vermont and the foreign income. Obviously, the Appellee has gone beyond recognized interstate taxing practices as determined by the Due Process Clause by the exercise of dominion over these dividends without even a tangential relationship with the State.

The nature of Appellant's business requires retail outlets for the sale of petroleum products in the various states. Further, the corporation has foreign subsidiaries and investments. However, the latter are not related to the domestic business of petroleum sales. At no time was any of the dividend income within the State of Vermont. These activities were carried on outside the State of Vermont and are far beyond the scope of Vermont taxing authority. Mobil has paid its fair share of allocable tax to Vermont, and there is no basis for an extra-territorrial taxation of these funds by Vermont.

MOORMAN v. BAIR IS DISTINGUISHABLE

The argument is raised that the recent decision in *Moorman Manufacturing Co. v. Bair*, ____U.S.____, 46 U.S.L.W. 4703 (June 15, 1978) is dispositive of the instant case. The two cases are clearly distinguishable. The challenge in *Moorman* concerned the single factor formula used by the State of Iowa in apportioning the tax liabilities of businesses engaged in interstate commerce. Appellant does not challenge the Vermont apportionment formula. Rather the issue is whether a specific portion of the monies which constitute Appellant's net income for apportionment are justifiably excludable from Vermont's apportionment computation. This issue is beyond the scope of *Moorman* in that the funds at issue are dividends from foreign sources. These are not monies from businesses in Mobil's domestic operations which were accurately reflected in the apportionable tax base of Vermont's formula. These funds were dividends from foreign subsidiaries. They were received, controlled, and administered in another state and have no relationship to the domestic operations. Further, these dividends are a product of foreign commerce to which Congress has given deference in the form of federal foreign tax credits. Appellant can deduct 85% of its dividend income under I.R.C. § 243. The State of Vermont allows no such deductions.

Thus, these circumstances exceed the parameters of the *Moorman* decision. The facts present crucial questions of the application of the Foreign Commerce Clause, Due Process, and the prohibition of double taxation. The question is a specific inquiry as to whether a state, and in this case the State of Vermont, can tax foreign source dividends without a sufficient nexus to bring the funds within the taxing jurisdiction.

Admittedly the *Moorman* decision recognizes that no apportionment formula can guarantee that there is not a margin of multiple taxation. This is distinguishable as the Appellant believes these monies are excludable and should not be included in the tax base, notwithstanding the potential for multiple taxation on the balance, due to disparate apportionment formulas among the states. This concept is more critically important when, as in the case at bar, the state cannot establish under any color of right a sufficient link to constitutionally sanction its inclusion of these dividends in an apportionment formula for state tax purposes.

USE OF *MOORMAN* RATIONALE PRECLUDES THE INCLUSION OF THE FUNDS IN THE STATE APPORTIONMENT FORMULA

In addition to Appellant's contention that the decision in *Moorman* does not extend to the instant case, there is language in that opinion which would under any circumstances exclude these monies. The opinion cites the decision in *Norfolk & Western Railroad Co. v. Missouri*, 390 U.S. 317, 325 (1958) wherein the Court makes clear that there must be "values connected with the taxing state" before the Court will sanction taxing authority. Further, in the *Moorman* opinion the reasoning is as follows:

> [S]tates have wide latitude in the selection of apportionment formulas and that a formula-produced assessment will only be disturbed when the taxpayer has proved by "clear and cogent evidence" that the income attributable to the State is in fact "out of all appropriate proportion to the business transacted . . . in that state."

Moorman v. Bair, ____U.S.____ (1978), 46 U.S.L.W. 4703, 4705 (June 15, 1978).

To reiterate the above discussion, these funds were dividends from foreign sources. Dominion and control of the monies were entirely in another state. The State of Vermont, by allowing Mobil to retail its products in the State, has offered no service or value that could by any reasoning reach these monies. The Appellant would be beyond the taxing authority of Vermont even by application of the decision in *Moorman*.

CONCLUSION

It is respectfully submitted that this case presents substantial federal questions concerning the Constitutional prohibition against interference in foreign commerce and the guarantee against multiple taxation. Further, there is a violation of the Due Process Clause by the taxation of foreign source dividends without the Constitutionally required nexus. There is no Supreme Court decision which is dispositive of this case. Based on the foregoing arguments there are jurisdictional grounds for the appeal before this Court.

Supreme Court, U. S.
FILED
JUN 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—VS.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

APPELLANT'S BRIEF

JEROME R. HELLERSTEIN
80 Pine Street
New York, New York 10005
(212) 344-1279

JOHN DWIGHT EVANS, JR.
150 East 42nd Street
New York, New York 10017
(212) 883-4965
Attorneys for Appellant

Of Counsel:

WILLIAM B. RANDOLPH
80 Pine Street
New York, New York 10005

June 26, 1979

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 3

Summary of Argument 6

ARGUMENT

I. The Inclusion of Mobil's Dividends in the Vermont Tax Base Violates the Due Process Clause Because There Is No Connection Between Mobil's Business, Property or Operations in Vermont and the Foreign Source Dividends Taxed 9

A. *Moorman* Is Inapplicable to the Due Process Issue in This Case 11

II. The Vermont Apportioned Tax on Mobil's Foreign Source Dividends Violates the Foreign Commerce Clause Because It Subjects the Taxpayer to a Risk of Multiple Taxation 14

A. The Principles Enunciated by This Court in *Japan Line* Apply to the Commerce Clause Issue in This Case 14

B. The Test of Multiple Taxation Is the Power of Other Jurisdictions to Tax, and Does Not Depend on the Exercise of That Power 16

PAGE

1. The Development of the Multiple Taxation Doctrine 16

2. The Decisions of This Court Do Not Support the Actual Multiple Taxation Test 18

3. The Propriety of the Risk Test 22

C. The Risks of Multiple Taxation Growing Out of the Diverse State Methods of Dividing Income, Found Constitutionally Tolerable in the Taxation of Operating Income From Interstate Commerce, Are Not Tolerable in the Case of Taxation of Dividends From Foreign Commerce 23

D. The Risk of Multiple Taxation of Foreign Commerce Created by the Vermont Tax Is Real and Substantial 26

E. The Traditional State Practice of Attributing Dividends Solely to the Taxpayer's Commercial Domicile Accords With Accepted Precepts of Fiscal Policy and Eliminates the Risk of Multiple Taxation of Foreign Source Dividends 29

1. History and the Judicial Decisions Support Taxation of Dividends Only by the State of Commercial Domicile 29

2. Fiscal Policy Considerations Underlying Jurisdiction to Tax Justify Taxation of Dividends Solely by the State of Commercial Domicile 30

PAGE

3. Commerce Clause Decisions of This Court Support Limitation of the Taxation of Foreign Source Dividends to a Single State to Avoid Multiple Taxation 34

4. Affirmation of the Sole Power of the State of the Commercial Domicile to Tax Foreign Source Dividends Is Not Inconsistent With the *Moorman* Case 36

III. The Vermont Tax Should Be Invalidated on the Ground That It Conflicts With Established Federal Policy in Regulating Foreign Commerce 38

A. Taxation of Dividends Derived From Foreign Commerce by a State Other Than the Recipient's Commercial Domicile Creates a Risk of Multiple Taxation Incompatible With the Established Federal Policies of Avoiding Double Taxation of Foreign Source Income and Encouraging the Payment of Foreign Dividends 39

1. There Is a Long-Established Congressional Policy of Encouraging Foreign Commerce by the Elimination of Double Taxation of Foreign Source Income 39

2. The Policies of Avoiding Double Taxation and Encouraging the Payment of Dividends Are Embodied in a Network of United States Tax Treaties 42

PAGE

3. Multiple State Taxation of Foreign Source Dividends Is Incompatible With the Federal Policies 43

CONCLUSION 48

APPENDIX A—

Vermont Statutes Involved 1a

APPENDIX B—

Allocation or Apportionment of Dividends Included in the Tax Base 4a

APPENDIX C-1

Chart of State Rules On Allocation and Apportionment 6a

APPENDIX C-2

Receipts Factor 8a

APPENDIX C-3

Property Factor 10a

APPENDIX C-4

Payroll Factor 12a

APPENDIX C-5

Methods of Valuing Property In Property Factors 14a

TABLE OF AUTHORITIES

Cases: PAGE

Austin v. *New Hampshire*, 420 U.S. 656 (1975) 22, 23, 34

Board of Trustees of University of Illinois v. *United States*, 289 U.S. 48 (1933) 15
Bowman v. *Chicago & N.R. Co.*, 125 U.S. 465 (1888) 24

Chestnut Securities Co. v. *Oklahoma Tax Commission*, 125 F.2d 571 (C.A. 10th 1942), *cert. denied*, 316 U.S. 668 (1942) 30
Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 16, 17, 21
Cream of Wheat Co. v. *County of Grand Forks*, 253 U.S. 325 (1920) 32
Crew Levick Co. v. *Pennsylvania*, 245 U.S. 292 (1917) .. 16
Curry v. *McCanless*, 307 U.S. 357 (1939) 31

Department of Revenue of the State of Washington v. *Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978) 17

Evco v. *Jones*, 409 U.S. 91 (1972) 12

First Bank Stock Corporation v. *Minn.*, 301 U.S. 234 (1937) 10, 30, 32
Freeman v. *Hewit*, 329 U.S. 249 (1946) 22
Frick v. *Pennsylvania*, 268 U.S. 473 (1925) 9, 12
F. W. Woolworth Company v. *Commissioner of Taxes*, 133 Vt. 93, 328 A.2d 402 (1974) 4

General Motors Corp. v. *Washington*, 377 U.S. 436 (1964) 16, 19, 22
General Trading Co. v. *State Tax Commission*, 322 U.S. 335 .....18, 35

PAGE

Gibbons v. *Ogden*, 9 Wheat. 1 (1824) 15
Goodyear Tire & Rubber Company, In Re, 133 Vt. 132, 335 A.2d 310 (1975) 4
Gwin, White & Prince, Inc. v. *Henneford*, 305 U.S. 434 (1939) 21

Hines v. *Davidowitz*, 312 U.S. 57 (1941) 44, 46

Illinois Central Railway v. *Minnesota*, 309 U.S. 157 (1939) 25
International Harvester Co. v. *Department of Treasury*, 322 U.S. 340 (1944) 18
International Harvester Co. v. *Evatt*, 329 U.S. 416 (1947) 16, 25, 35

Japan Line Ltd. v. *County of Los Angeles*, 47 U.S.L.W. 4477 (April 30, 1979) 14, 15, 21-26, 36, 39, 46

Liverpool L. & G. Insurance Co. v. *New Orleans*, 221 U.S. 346 (1911) 32

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940) 16, 17
McGoldrick v. *Gulf Oil Corporation*, 309 U.S. 414 (1940) 15, 16, 44, 45
McLeod v. *Dilworth Co.*, 322 U.S. 327 (1944) 18, 20, 35, 47
Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157 (1954) 12
Miller Bros. Co. v. *Maryland*, 347 U.S. 340 (1954) 9, 12
Mobil Oil Corp. v. *Commissioner of Taxes*, 394 A.2d 1147 (1978) 2
Moorman Manufacturing Co. v. *Bair*, 437 U.S. 267 (1978) 7, 11, 13, 16, 21, 25, 28, 36, 37, 43

PAGE

National Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753 (1967) 12
National Distillers Products Corp. v. *City and County of San Francisco*, 141 Cal. App. 2d 651, 297 P.2d 61 (1956) 45
National Geographic Society v. *California Board of Equalization*, 430 U.S. 551 (1977) 36
Newark Fire Insurance Co. v. *State Board of Tax Appeals*, 307 U.S. 313 (1939) 32
New Orleans v. *Stempel*, 175 U.S. 309 (1899) 32
Northwestern States Portland Cement Co. v. *Minnesota*, 358 U.S. 450 (1959) 16, 18, 19, 47
Norton Co. v. *Department of Revenue*, 340 U.S. 534 (1951) 10

Pacific Telephone and Telegraph Company v. *Franchise Tax Board*, 102 Cal. Reptr. 782, 498 P.2d 1030 (1972) 30

Shaffer v. *Carter*, 252 U.S. 37 (1940) 31
Southern Pacific Company v. *McColgan*, 68 Cal. App.2d 48, 156 P.2d 81 (1945) 30
Standard Pressed Steel Co. v. *Department of Revenue of Washington*, 419 U.S. 560 (1975) 20, 21

Treichler v. *Wisconsin*, 338 U.S. 251 (1949) 12

United Gas Corporation v. *Fontenot*, 241 La. 488, 129 So.2d 748 (1961) 30
United States Glue Co. v. *Town of Oak Creek*, 247 U.S. 321 (1918) 32

Western Live Stock v. *Bureau of Revenue*, 303 U.S. 250 (1938) 16, 17

PAGE

Wheeling Steel Corporation v. *Fox*, 298 U.S. 193 (1936) 10, 30

Williams v. *Stockham Valves & Fittings, Inc.*, 358 U.S. 450 (1959) 16, 47

Wisconsin v. *J.C. Penney Co.*, 311 U.S. 435 (1940) 11, 31

Constitution:

Commerce Clause, Article I, § 8, cl. 3 ..... 3, 7, 8, 12, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 34, 36, 47

Due Process Clause, Amendment XIV, § 1 ..... 2, 3, 6, 9, 11, 12, 13, 25

International Treaties:

Convention for Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), 49 Stat. 3000, Treaty Series No. 876 (1935) 38

Customs Convention on Containers, 20 U.S. Treaties and Other International Agreements 301, Treaties and Other International Acts Series No. 6634 (1956) 38

General Agreement on Tariffs and Trade (GATT), 61 Stat. A3, Treaties and Other International Acts Series No. 1700 (1947) 38

United States Tax Treaties with

- Australia 42, 43
- Belgium 42, 43
- Canada 43
- France 42, 43
- The Federal Republic of Germany 42, 43
- Japan 42, 43
- Netherlands 42
- United Kingdom 42

Statutes: PAGE

A. Federal

Asian Development Bank Act, 22 U.S.C. §§ 285 *et seq.* (1966) 38

Export Administration Act of 1969, § 3, 50 U.S.C. § 2401 (1969) 38

Export-Import Bank Act of 1945, 12 U.S.C. § 635 *et seq.* (1945) 38

Foreign Assistance Act of 1961, 22 U.S.C. § 2351 (1961) 38

Inter-American Development Bank Act, 22 U.S.C. § 283 *et seq.* (1959) 38

Internal Revenue Code

- § 172(b)(1)(D) 41
- § 172(h) 41
- § 243 ..... 6, 40
- § 245 6
- § 883 41
- § 896 41
- § 901 ..... 6, 39
- § 902 ..... 6, 39
- § 903 39
- § 904 39
- §§ 911-913 41
- §§ 970-971 41
- §§ 991-997 41
- § 1351 41

Revenue Acts

- 1918 40
- 1921 40
- 1924 40
- 1926 40

PAGE

1928 40
1932 40
1934 40
1936 40
1938 40
1939 40

Trade Act of 1974, § 2, 19 U.S.C. § 2101 (1974) 38

Webb-Pomerene Act, 15 U.S.C. § 61 *et seq.* (1964) 38

B. State
Arizona Revised Statutes
§ 43-135(g) 32

Hawaii Revised Statutes
§ 235.5(e)(1) 27
§ 235.21 *et seq.* 27

Kentucky Revised Statutes
§ 141 33

Louisiana Revised Statutes Annotated
§ 234(4) 32

Michigan Compiled Laws
§ 208 33

Missouri Revised Statutes
§ 143 33

New York City Administrative Code, Chapter 46
Tit. A 34
Tit. L 34
Tit. R 33

New York Tax Law
Art. 9-A 33
Art. 28 34

PAGE

Oklahoma Statutes, Title 68
§ 2358A.-3.-b 32

Purdon's Pennsylvania Statutes Annotated
Title 72 33

Vermont Statutes Annotated, Title 32
§ 5811(18) 3
§ 5833 3

West Virginia Code
§ 11-24-6 33

Other Authorities:

Carlson, State Taxation of Corporate Income From Foreign Sources, Essays In International Taxation: 1976, 231, 266, Department of the Treasury, Washington, D.C. (1976) 28

Draft Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital, Organization for Economic Cooperation and Development 43

General Explanation of the Tax Reform Act of 1976, Staff, Joint Committee on Taxation, H.R. 10612 (94 Cong. Pub. L. 94-455) 41

Governmental Finances in 1976-1977, p. 64, Bureau of Census, U.S. Dept. of Commerce (GF 77, No. 5) 33

Hartman, State Taxation of Corporate Income from a Multistate Business, 13 Vand. L.Rev. 21 (1959) 13, 29

Hearings on Tax Conventions with Belgium, Finland, Trinidad and Tobago, and The Netherlands, Senate Foreign Relations Committee, p. 2 (91st Cong. 2d Sess., Oct. 6, 1970) 42, 43

PAGE

Hearings on United States-Brazil Tax Treaty, Senate Foreign Relations Committee, pp. 19-20 (90th Cong. 1st Sess., Oct 5, 1967) 40

House Ways and Means Committee Report, Revenue Bill of 1934, pp. 15-16 (H.R. Rep. No. 704, 73rd Cong. 2d Sess.) 40

Internal Revenue Service, Statistics of Income—1973, Corporation Income Tax Returns, U.S. Government Printing Office (1977) 28

Patrick, A Comparison of the United States and OECD Model Income Tax Conventions, Law and Policy in International Business: Issues in International Taxation, 10 Intl. J. of Georgetown University Law Center 613 (1978) 42

Seidman's Legislative History of Federal Income Tax Laws, 1938—1861, p. 928 (1938) 40

Slowinski, Federal Taxation and Foreign Policy, 20 U. of Fla. L. Rev. 489 (1968) 41

State Taxation of Interstate Commerce, Report of Special Subcommittee on State Taxation of Interstate Commerce, House Judiciary Committee, Vol. 1, p. 204 *et seq.* (88th Cong. 2d Session H.R. No. 1480) (Willis Comm. Rep.) 29, 32

Tax Reform Act of 1976, Senate Finance Committee Report on H.R. 10612, p. 233 (S.Rep. No. 94-938, 94th Cong. 2d Sess.) 41

Tax Reform Act of 1975, House Ways and Means Committee Report on H.R. 10612 (H.Rep. No. 94-658, 94 Cong. 1st Sess.) 41

Uniform Division of Income for Tax Purposes Act ..27, 28

PAGE

United States Treasury Department Model Income Tax Treaty of March 17, 1977 43

Watson, Allocation of Business Income for State Income Tax Purposes, 25 Minn.L.Rev. 851 (1941) 29

Wilkie, A Basis for Taxing Corporate Net Income, 36 Taxes 807 (1958) 31, 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—VS.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

APPELLANT'S BRIEF

Opinions Below

The findings of fact and conclusions of law by the Commissioner of Taxes of the State of Vermont are found in the Commissioner's Determination of Appeal, dated April 11, 1974 ,which is set forth in JS. App.-1a;[1] the determination is unreported. The opinion of the Washington County Superior Court reversing the Commissioner's determination and holding in favor of the appellant is contained in that court's order, dated January 6, 1977 and that court's final order, dated June 9, 1977, which are set forth in JS. App.-14a; the orders are unreported. The opinion of the Vermont Supreme Court reversing the Su-

[1] "JS. App." refers to pages in the appendix to the Jurisdictional Statement filed with this Court on February 2, 1979. "Br. App." refers to the appendices which appear at the end of this brief and "App." refers to the pages in the single appendix filed by the parties.

perior Court is reported at 394 A.2d 1147 (1978). The order and opinion of that Court are set forth in JS. App.-19a.

Jurisdiction

The final decree of the Vermont Supreme Court was filed on November 9, 1978. This appeal was docketed within 90 days from that date. On May 14, 1979, this Court noted probable jurisdiction. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Questions Presented

Where a State imposes an income tax on a corporation that is engaged in foreign commerce and the corporation is neither organized under the laws of the taxing State nor maintains its commercial domicile in that State, and the apportionable base of the income tax includes dividends received by the corporation from subsidiaries and non-subsidiaries conducting all their business in foreign countries:

(1) Does the inclusion of the foreign source dividends in the apportionable base of the tax violate the Due Process Clause of the Fourteenth Amendment where the only connection between the corporation and the taxing State was the sale of products in that State, and the shares on which the dividends were paid were held, managed and controlled by the corporation from its offices outside the taxing State and the receipt, use and disposition of the dividends were managed and directed from offices outside the State?

(2) Does the inclusion of the foreign source dividends in the apportionable base of the tax subject

the corporation to a risk of multiple taxation prohibited by the Foreign Commerce Clause?

(3) Is the taxation of the foreign source dividends on an apportioned basis invalid on the ground that it frustrates established Federal policy in regulating foreign commerce?

Constitutional and Statutory Provisions Involved

Commerce Clause (Art. I, § 8, cl. 3):

"The Congress shall have power . . . to regulate commerce with foreign Nations and among the several States, and with the Indian Tribes;"

Due Process Clause (Amend. XIV, § 1):

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law;"

The pertinent sections of the Vermont Statutes Annotated, Title 32, sections 5811 (18) and 5833, are set forth in Br. App. A, p. 1a.

Statement of the Case

The Vermont income tax deficiencies in controversy are as follows:

Year	*Deficiency*	*Interest*	*Total*
1970	$15,078.56	$ 339.27	$15,417.83
1971	31,205.52	858.15	32,063.67
1972	25,359.69	443.80	25,803.49
Total	$71,643.77	$1,641.22	$73,284.99[2]

[2] The deficiency and interest for 1970 shown in the table include the gross-up of dividends. The Commissioner agreed to modify

(Footnote continued)

During the years at issue, 1970, 1971 and 1972, the appellant ("Mobil"), a New York corporation (Stipulation of Facts ["Stip"] ¶ 1, App. 79), was engaged in the United States in the petroleum business, including exploration, production, refining, transportation, distribution and sale of petroleum and petroleum products, and in chemical and related mining businesses (Stip. ¶ 6, App. 81). Mobil was engaged in interstate and foreign commerce. (Stip. ¶ 8, App. 82). It was subject to net income taxes or franchise taxes measured by net income imposed by Vermont and some 40 other States and the District of Columbia. (*Ibid.*).

Mobil's corporate headquarters, principal place of business and commercial domicile were in New York City. (Stip. ¶ 7, App. 82). Its only activity in Vermont was the wholesale and retail marketing of petroleum products and related products. (Stip. ¶ 9, App. 82). It had no oil or gas production or refineries in the State (*Ibid.*)

Mobil owned the capital stocks of a large number of domestic and foreign corporations;[3] dividends were the major source of Mobil's taxable income. At December 31st of each year Mobil owned, directly or indirectly, cap-

the gross-up for that year in a manner consistent with the decisions in *F. W. Woolworth Company* v. *Commissioner of Taxes*, 133 Vt. 93, 328 A.2d 402 (1974) and *In Re Goodyear Tire & Rubber Company*, 133 Vt. 132, 335 A.2d 310 (1975). JS. App.-2a. In addition, there were added to the taxable base for each of the years comparatively small amounts of interest received by Mobil on securities, certificates of deposit and time deposits. No appeal has been taken with respect to the taxation of that interest. The tax deficiency figures set out above have not been adjusted for the foregoing items.

[3] The term "domestic" corporation refers to a corporation organized under the laws of one of the States, and "foreign" corporation to a corporation organized under the laws of a foreign country.

ital stock of foreign subsidiary,[4] and 5% or more of the capital stock of domestic and foreign non-subsidiary, corporations as follows (Stip. ¶ 10, App. 82):

	1970	*1971*	*1972*
Foreign Subsidiary Corporations	203	208	216
Domestic Nonsubsidiary Corporations	26	27	27
Foreign Nonsubsidiary Corporations	185	189	197

Mobil's shareholder equity, on a net worth book basis, in its foreign operating subsidiaries and foreign operating consolidated affiliates amounted to 45%, 47% and 48%, respectively, of Mobil's total net worth for the three years at issue. (Stip. ¶ 16, App. 84).

Mobil's business as the owner of the stocks was in all respects conducted, managed and directed at the company's offices outside the State of Vermont. (Stip. ¶¶ 7 and 11, App. 82-83). All dividends were received outside Vermont, and Mobil's control and use of the dividends were managed and directed from its offices outside that State. (*Ibid.*). More than 99% of the dividends at issue were received by Mobil from corporations deriving all, or all but an insignificant portion, of their income from sources outside the United States. (Stip. ¶ 26, App. 88).

The assessment in controversy is based on the inclusion in the tax base, before apportionment, of 15% of the dividends received by Mobil from domestic non-subsidiary corporations, in amounts ranging from approximately $17,800,000 to $25,900,000 for the years at issue, and 100% of the dividends received from subsidiaries and non-subsidiaries organized under the laws of foreign countries, in

[4] The term "subsidiary" refers to a corporation more than 50% of whose stock is owned by Mobil.

amounts ranging from approximately $156,000,000 to $264,000,000 (App. 75-78).[5]

Summary of Argument

1. *The Vermont Tax Is Invalid under the Due Process Clause.* Mobil contends that the Vermont apportioned tax on its foreign source dividends violates the Due Process Clause of the Fourteenth Amendment because there is no nexus between the State and the income being taxed. The stocks on which the dividends at issue were paid were held, managed and controlled outside the State, and the receipt, use and disposition of the dividends were managed and directed entirely outside Vermont.

A State's power to tax a corporation, organized under the laws of another State, and doing business in the State, cannot, under the Due Process Clause, be extended to transactions or income with which the State has no definite link or minimum connection. To do so would violate the recognized principle that State taxation must bear a fiscal

[5] The Vermont income tax law conforms to the Federal corporation income tax rules by excluding from the tax base, before apportionment, all dividends received from 80% or more owned domestic corporations and 85% of the dividends received from domestic corporations that are less than 80% owned (subject to technical qualifications). IRC § 243, Vt. § 5811(18), Br. App. A, p. 1a. The State law also follows the Federal rule of including in the tax measure all the dividends received from corporations organized under the laws of foreign countries (with exceptions not here applicable). IRC §§ 243, 245, Vt. *ibid.* Unlike the Federal income tax, the Vermont tax grants no credits for foreign income taxes paid either by the taxpayer or by a dividend-paying foreign corporation, 10% or more of whose stock the taxpayer owns. IRC §§ 901-902, Vt. *ibid.*

Under the Vermont law the dividends taxed are included in the apportionable tax base along with operating income. The apportionment is made under a three-factor formula consisting of property, payroll and gross sales or charges for services performed. Br. App. A, p. 2a. Dividends are not included in the numerator or denominator of the gross sales or charges for services factor.

relation to the protection, opportunities and benefits provided by the State. Because Mobil's only activities in Vermont related to the sale of its products, the tax lacks the due process links to the foreign source dividends requisite to their taxation by the State.

This contention is not in conflict with *Moorman Manufacturing Co.* v. *Bair* (437 U.S. 267 [1978]), because the controversy in that case involved a challenge to a State's method of apportionment of admittedly taxable operating income. Mobil is not challenging Vermont's method of apportionment but, instead, its power to tax the dividends under any method of apportionment or allocation.

2. *The Vermont Tax Conflicts with the Foreign Commerce Clause.* This Court's tolerance of multiple taxation of operating income derived from interstate commerce as a result of conflicting methods of allocation and apportionment, is inapplicable to the case at bar. Here, because foreign commerce is involved, multiple taxation attributable to such diversity in the methods of dividing income is constitutionally unacceptable.

The decisions of this Court establish that the test of multiple State taxation prohibited under the Commerce Clause lies in the power of other States to tax; they do not require a showing of actual duplicative taxation by other States.

The Vermont apportioned tax on the foreign source dividends is unconstitutional under the multiple taxation doctrine, because (a) the diversity of State allocation and apportionment methods applicable to dividends inevitably produces a risk of duplicative taxation; (b) the State of a dividend recipient's commercial domicile has long been recognized by the practice of the States, and by decisions of State and lower Federal courts, as having the power to tax dividends in full; and (c) there is no constitutional

warrant, and no basis in the fiscal policy underlying jurisdiction to tax, for depriving the State of commercial domicile of this traditional power of taxation.

Affirmation by this Court of the principle that foreign source dividends received by a corporation engaged in foreign commerce are taxable in full by the State of the corporation's commercial domicile, and that no other State may include the dividends in its apportioned tax, is supported by precedent. This Court has resolved multiple taxation issues in two other Commerce Clause areas—interstate sales and use taxation and State taxation of property used in foreign transportation—by limiting the tax exclusively to a single jurisdiction.

3. *The Vermont Tax is Incompatible with Federal Policies Regulating Foreign Commerce.* A policy of eliminating double taxation of foreign source income has long been established in Congressional income tax legislation. United States tax treaties with a large number of countries also reflect Federal policies of eliminating at the national level double taxation of dividends derived from foreign source earnings, and of encouraging the payment of dividends to United States corporations.

The Vermont tax on Mobil's foreign source dividends frustrates these Federal policies, as well as other Federal legislation designed to foster foreign commerce, by subjecting corporations that receive such dividends to a risk of multiple taxation of the income at the State level. Multiple State taxation of foreign source dividends tends to discourage foreign commerce, is a disincentive to the payment of the dividends to United States corporations, and, accordingly, frustrates the purposes of the Federal policies to the contrary. The Vermont tax is, therefore, repugnant to the Commerce Clause.

ARGUMENT

I.

The Inclusion of Mobil's Dividends in the Vermont Tax Base Violates the Due Process Clause Because There Is No Connection Between Mobil's Business, Property or Operations in Vermont and the Foreign Source Dividends Taxed.

Under the Due Process Clause, "while a State may so shape its tax laws as to reach every object which is under its jurisdiction, it cannot give them any extra-territorial operation". (*Frick* v. *Pennsylvania*, 268 U.S. 473, 489 [1925].) This Court has given "consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." (*Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 344-345 [1954]).

Here, since all of Mobil's business and activities relating to its ownership, management and control of its stocks and the dividends they produced, were carried on outside the taxing State, the "definite link" or "minimum connection" required by the Due Process Clause to sustain the Vermont tax is missing. Moreover, there is no nexus between Vermont and the underlying earnings out of which the dividends were paid, since the payor corporations conducted no business, maintained no offices or employees, owned or leased no property, and derived no income from sources within the State. (Stip. ¶¶ 25-27, App. 88).

The fact that Mobil engages in the wholesale and retail marketing of products in Vermont does not warrant taxation of the income from its holding company and investment business conducted entirely outside the State. In

Norton Co. v. *Department of Revenue* (340 U.S. 534, 537 [1951]), the Court stated:

> ". . . when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only by showing that particular transactions are disassociated from the local business and interstate in nature."

The requisite showing has been made in the instant case. All the transactions and all of Mobil's activities and operations having to do with the stocks and the dividends at issue were disassociated from its business in Vermont. All the dividends were derived from foreign source earnings.

The State of a corporation's commercial domicile is, by definition, the seat of the control and management of its affairs. (*Wheeling Steel Corporation* v. *Fox*, 298 U.S. 193 [1936]; *First Bank Stock Corporation* v. *Minn.*, 301 U.S. 234 [1937]). It is there that the executive and financial officers of corporations and their staffs customarily carry on the corporation's business and activities as owners and investors in the stocks in their subsidiaries and affiliates. Mobil's commercial domicile was located in New York (Stip. ¶ 7, App. 82). The activities, personnel and property of Mobil in Vermont, in which only the marketing of petroleum and related products was conducted, have nothing to do with Mobil's holding of stocks in foreign subsidiaries or affiliates or its foreign investments, or the dividend income they produce. Vermont provides Mobil no benefits or protection and it incurs no social costs in furnishing any public services to Mobil with respect to the Company's ownership or management of the stock of its subsidiaries or non-subsidiaries, or in its handling and disposition of its foreign source dividend income. On

these facts Vermont has no constitutional basis for taxing the dividends in issue, for as stated in *Wisconsin* v. *J.C. Penney Co.* (311 U.S. 435, 444 [1940]):

> "[T]he . . . test is . . . whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

A. *Moorman Is Inapplicable to the Due Process Issue in This Case.*

Moorman Manufacturing Co. v. *Bair, supra,* is not inconsistent with the contention here being made, for that case dealt with a challenge to the State's method of apportioning admittedly taxable income. In *Moorman* the income arose from selling and warehousing carried on in the State, the taxability of which was conceded; the controversy related to Iowa's method of apportionment. Jurisdiction to tax was not at issue in *Moorman.* Indeed, in *Moorman* Iowa did not include the taxpayer's dividend income in the taxable base or in the apportionment. (437 U.S. at 269).

In this case, on the contrary, we are not here challenging Vermont's method of apportionment, but instead contend that the State lacks jurisdiction under the Constitution to include the dividends in the tax base under any method of apportionment.

While this Court has generally abstained from intervening in taxpayers' challenges to State methods of apportionment, except in the most flagrant cases, *Moorman* being the most recent and most articulate enunciation of that policy, the Court has followed a different policy in dealing with jurisdiction of the States to tax. When it

has been confronted with taxpayers' challenges to the power or jurisdiction of a State to tax, whether under the Due Process or the Commerce Clause, this Court has always recognized its constitutional role as arbiter between taxpayers and the various States.[6]

There are very good reasons for this difference in the Court's functioning in the apportionment and jurisdictional areas of State taxation. *Apportionment* involves highly technical problems of accounting and an intimate knowledge of the methods of operation and the available records and data of a wide variety of industries, as well as evaluation of the impact on taxpayers and on the revenues of the differing State economies of diverse techniques of dividing income. Typically, any one of several alternative formulas may be reasonable and viable. Such matters need to be resolved, in broad outlines at least, by legislators, after extensive factual investigation with the advice and assistance of tax administrators and other experts, and a determination of the dollar consequences of alternative solutions to multistate, multinational and local business and to the revenues of the various States. Institutionally, courts are not equipped, and do not have the supportive facilities, to resolve such questions.[7] Nor do they have the constitutional power to adopt the most desirable policy, since the judicial role is the limited one of determining whether a particular method of apportionment, applied by a State to the taxpayer before the Court, violates the provisions of the Constitution restricting the powers of the State to tax. (See *Moorman Manufacturing Co.* v. *Bair, supra*, 437 U.S. at 280.)

The delineation of the constitutional powers of the State *to tax* business, activities, transactions, income, or the like is a very different matter. The types of questions that arise in accommodating, under our Federal system, the revenue needs of the States with the interest of multistate and multinational businesses in being safeguarded against undue tax burdens not borne by local business, and at the same time protecting the Federal interest in maintaining a vigorous national economy, are within the province and competence of the courts, and indeed, are of a character that are grist in the mill of this Court's role in passing on various types of constitutional controversies.

Accordingly, *Moorman* has no bearing on the Due Process issue in this case.

---

[6] *Frick* v. *Pennsylvania*, 268 U.S. 473 (1925) and *Treichler* v. *Wisconsin*, 338 U.S. 251 (1949). Real and tangible personal property are taxable under death tax laws only of the State in which the property is located.

Miller Bros. Co. v. *Maryland*, 347 U.S. 340 (1954). A State(S) is without constitutional power to require a department store located in a neighboring State(N) to collect a use tax on sales of goods to residents of S, where the sales were made in N, although delivery was made to customers in S.

National Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753 (1967). A State does not have the power to require an out-of-state mail order house having no offices, employees or property in the State, but making all its contacts with customers in the State via United States mail or common carrier, to collect a use tax on sales to local residents.

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157 (1954). The Commerce Clause prohibits a State from levying a tax on an interstate pipeline on its taking of natural gas in the State from its supplier into the pipeline for transportation to other States.

Evco v. *Jones*, 409 U.S. 91 (1972). The Commerce Clause prohibits a State from imposing a gross receipts tax on receipts from sales outside the State of goods produced within the State.

[7] See, Hartman, "State Taxation of Corporate Income from a Multistate Business", 13 Vand L.Rev. 21, 124 (1959).

II.

The Vermont Apportioned Tax on Mobil's Foreign Source Dividends Violates the Foreign Commerce Clause Because It Subjects the Taxpayer to a Risk of Multiple Taxation.

A. *The Principles Enunciated by This Court in* Japan Line *Apply to the Commerce Clause Issue in This Case.*

The multiple taxation doctrine prohibits the States from subjecting interstate or foreign commerce to risks of duplicative taxation not borne by intrastate commerce. (See point B, p. 16 *infra*). The recent decision of this Court in *Japan Line Ltd.* v. *County of Los Angeles* (47 U.S.L.W. 4477 [April 30, 1979]) has made it clear that the duplicative State taxation resulting from the diversity of State apportionment and allocation methods, constitutionally tolerable in dealing with State taxation of operating income from interstate commerce, is not tolerable in dealing with State taxation of foreign commerce.

The principles enunciated in *Japan Line* are applicable to the present case. There the Court invalidated a property tax imposed by the County of Los Angeles on shipping containers used exclusively in the transportation of cargo in foreign commerce by Japanese corporations having their principal places of business and commercial domiciles in Japan, even though the containers had an adequate nexus with the County and the tax was deemed to be fairly apportioned. The tax was invalidated on two grounds: (1) that the California tax resulted in multiple taxation of foreign commerce; and (2) that the tax was in conflict with established Federal policy and, accordingly, would prevent the Federal government from "speaking with one voice" in international trade.

The Court found it unnecessary in the *Japan Line* case to reach the question as to the validity under the Foreign Commerce Clause of an apportioned State property tax on domestically owned instrumentalities of foreign commerce. (47 U.S.L.W. at 4480, note 7). Nevertheless, it is submitted that the same basic principles as underlay the Court's invalidation of the tax on the containers of the Japanese, foreign based corporations, are applicable to the taxation of corporations organized and domiciled in the States of this country. Surely, the Foreign Commerce Clause is designed to provide at least as much protection from undue burdens of State taxation on foreign commerce to United States corporations based in this country, as to foreign corporations based abroad. And the supremacy of the Federal government in regulating commerce with foreign nations, likewise, applies at least in *pari passu* to State taxation of United States enterprises as to taxation of foreign enterprises. Indeed, Federal Executive actions and Congressional legislation designed to encourage foreign trade have been utilized principally to benefit and protect American corporations based in this country that operate in foreign commerce. (See III, p. 38 *infra*).

This Court recognized as early as *Gibbons* v. *Ogden* (9 Wheat. 1, 192 [1824]) that the Foreign Commerce Clause "comprehend[s] every species of commercial intercourse between the United States and foreign nations". See also (*Board of Trustees of University of Illinois* v. *United States*, 289 U.S. 48, 56 [1933]). It has struck down State taxes imposed on corporations organized and domiciled in this country when it has found the tax violative of the Foreign Commerce Clause, or in conflict with Congressional legislation adopted to "enable American manufacturers to compete more favorably with their foreign competitors". (*McGoldrick* v. *Gulf Oil Corporation*, 309 U.S. 414, 427

[1940], which is discussed at p. 44 *infra; Crew Levick Co.* v. *Pennsylvania,* 245 U.S. 292 [1917]).

B. *The Test of Multiple Taxation Is the Power of Other Jurisdictions to Tax, and Does Not Depend on the Exercise of That Power.*

The Vermont court held that the multiple taxation restraint on State taxation of income under the Commerce Clause depends on a showing of actual taxation by other jurisdictions, citing the *Moorman* case, *supra, Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 278 (1977); *General Motors Corp.* v. *Washington,* 377 U.S. 436, 449 (1964); *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 462-63 (1959). (JS. App.-29a). This, we submit, is an erroneous reading of the cases.

1. The Development of the Multiple Taxation Doctrine.

It is indisputable that the architects of the multiple taxation doctrine viewed the *power* of other States to tax, irrespective of its actual exercise, as the test of multiple taxation prohibited by the Commerce Clause. That doctrine had its origin in, and was an essential concomitant to, the broadening by this Court beginning in the middle 30's of the powers of the States to tax transactions in, and income derived from, interstate commerce. (*Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250 [1938]; *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U.S. 33 [1940]; *International Harvester Co.* v. *Evatt,* 329 U.S. 416 [1947]). That process has continued, and was marked dramatically by the Court's holding in 1959 that a State may impose a fairly apportioned net income tax on the income of an exclusively interstate business (*Northwestern States Portland Cement Co.* v. *Minnesota* and *Williams* v. *Stockham Valves & Fittings, Inc.,* 358 U.S. 450 [1959]), and by its recent decision overruling the long-standing principle that

an excise or franchise tax on a foreign corporation for the privilege of conducting an exclusively interstate business in the State is repugnant to the Commerce Clause (*Complete Auto Transit, Inc.* v. *Brady, supra*; see also, *Department of Revenue of the State of Washington* v. *Association of Washington Stevedoring Companies,* 435 U.S. 734, [1978]).

Although the Court swept away the traditional view that under the Commerce Clause "interstate commerce may not be taxed at all" and that the Commerce Clause created an area of trade free of State taxation, it by no means left interstate commerce unprotected, in the silence of Congress. In place of the tax-free haven doctrine, there was erected the multiple taxation doctrine, under which taxes on interstate businesses are held to conflict with the Commerce Clause, if they subject interstate commerce to a risk of multiple taxation not borne by intrastate commerce. (*Western Live Stock* v. *Bureau of Revenue, supra; McGoldrick* v. *Berwind-White Coal Mining Co., supra*). The multiple taxation doctrine became the key constitutional protection against State taxes that are not *per se* discriminatory but, nevertheless, impose undue tax burdens on interstate commerce. As stated by this Court:

> "The vice characteristic of those [taxes] which have been held invalid is that they have placed on the commerce burdens of such a nature *as to be capable,* in point of substance, *of being imposed* . . . or added to . . . *with equal right by every state which the commerce touches,* merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." (Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 255-56 [1938]; emphasis added).

"Again, the State may not impose cumulative burdens upon interstate trade or commerce. Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434; 59 S.Ct. 325, 83 L. Ed. 272; J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307; 58 S.Ct. 913, 82 L. Ed. 1365, 117 A.L.R. 429. Thus, the state may not impose certain taxes on interstate commerce, its incidents of instrumentalities, which are no more in amount or burden than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and *either the actuality or the risk of their doing so* makes the total burden cumulative, discriminatory or special." (Mr. Justice Rutledge's single opinion in *McLeod* v. *Dilworth Co.*, 322 U.S. 327, 349, at 358 [1944]), *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, and *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340; emphasis added).

2. The Decisions of This Court Do Not Support the Actual Multiple Taxation Test.

The view now being urged by some States, that the multiple taxation prohibition on State taxation of interstate commerce depends on actual, rather than the risk of multiple taxation, appears to stem from a statement in the opinion in *Northwestern States Portland Cement Co., supra*, that:

". . . the taxpayers must show that the formula places a burden on interstate commerce in a constitutional sense." (358 U.S. at 463).

The quoted statement is not at odds with our position. At the outset of the paragraph of the opinion in which the statement is found, the Court said, in discussing the possibility that a multiple tax burden resulted from the taxes at issue:

". . . none is shown to exist here. This is not an unapportioned tax which by *its very nature* makes interstate commerce bear more than its fair share . . ." (358 U.S. at 462; emphasis added).

The Court was addressing itself, not to proof that another State had in fact taxed the income that Minnesota and Georgia, the States whose taxes were being challenged, sought to include in the apportioned measures of their taxes, but to the "very nature" of the levies in creating "the possibility of a multiple burden . . ." (*Ibid.*). That is the import of the statement that "the taxpayers must show that the formula places a burden upon interstate commerce *in a constitutional sense.*" (*Id.*, 358 U.S. at 463; emphasis added).

Two other opinions of this Court, both involving the Washington business activities tax, have been cited by some State tax administrators to support the contention that the multiple taxation prohibition on State taxation depends on a showing of actual taxation of the same thing by another State. In the first case, *General Motors Corp.* v. *Washington*, (377 U.S. 436, 449 [1964]), the Court said:

". . . In Northwestern States Portland Cement Co. v. Minnesota . . . , we held that '[i]n this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense.' Appellant has not done this. It has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax. *Cf.* International Harvester Co. v. Evatt, 329 U.S. 416, 421-423, 67 S. Ct. 444, 446-448, 91 L.Ed. 390,

394-396 (1947). And further, it has not been shown that Oregon levies any tax on appellant's activity bearing on Washington sales."

This opinion does no more than affirm that a State tax is in conflict with the Commerce Clause if the taxpayer shows either that the tax (a) by its nature "places a burden on interstate commerce in a constitutional sense", or (b) that another State has in fact exercised its constitutional power to tax the same thing. That is precisely what Mr. Justice Rutledge, one of the chief architects of the multiple taxation doctrine, stated in defining the doctrine:

> ". . . the state may not impose certain taxes on interstate commerce . . . because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and *either the actuality or the risk* of their doing so makes the total burden cumulative. . ." (*McLeod* v. *Dilworth, supra,* 322 U.S. at 358; emphasis added).

In the other Washington case, *Standard Pressed Steel Co.* v. *Department of Revenue of Washington* (419 U.S. 560, 563 [1975]), Mr. Justice Douglas wrote:

> "We noted in *General Motors* that a vice in a tax on gross receipts of a corporation doing an interstate business is the risk of multiple taxation; but that the burden is on the taxpayer to demonstrate it, *id.,* at 449, 84 S.Ct. 1564. The corporation made no such showing there. Nor is any effort made to establish it here."

That this statement is consonant with our view that multiple taxation may be shown by the risk, as distinguished from the exercise, of the power of taxation of other jurisdictions becomes evident from the remainder of the paragraph from which the foregoing is quoted. The opinion there quotes with approval the exposition of the multiple taxation doctrine as set forth in *Gwin, White & Prince, Inc.* v. *Henneford* (305 U.S. 434, 439 [1939]):

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, *'the risk of a multiple burden to which local commerce is not exposed.'* " (419 U.S. at 564; emphasis added).[8]

The most recent opinion referring to the question, *Japan Line,* indicates that the actual double taxation test has by no means been embraced by this Court as the constitutional standard for adjudging whether a State tax subjects commerce to multiple taxation.[9]

---

[8] Neither *Complete Auto Transit,* 430 U.S. at 278, nor *Moorman,* although both were cited by the Vermont court, considered the issue of the risk versus the actuality of double taxation under the Commerce Clause. The Vermont court's reference to *Moorman* (98 S.Ct. at p. 2346) is to the taxpayer's contention that it had established actual duplication of taxation by Iowa of income taxed in Illinois. This Court found the evidence faulty, but there is no consideration in the opinion of the propriety of the risk test of multiple taxation, as contrasted with actual multiple taxation.

[9] "Because California's tax in this case creates multiple taxation in fact, we have no occasion here to decide under what circumstances the mere *risk* of multiple taxation would invalidate a state

(Footnote continued)

3. The Propriety of the Risk Test.

The risk test, as envisioned by the creators of the multiple taxation doctrine, Justices Stone and Rutledge, is we submit, the proper one. The reasons underlying that view were stated by Mr. Justice Frankfurter:

> "It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment." (*Freeman* v. *Hewit*, 329 U.S. 249, 256 [1946]).

Mr. Justice Goldberg expressed the same view:

> "Presumably, if there is to be limitation of the taxing power of each of these States, that limitation surely cannot be on a first-come-first-tax basis." (See dissent in *General Motors Corporation* v. *Washington, supra*, 377 U.S. at 458).

This Court has recently had occasion to consider the same basic question in a different context. In *Austin* v.

---

tax, or whether the risk would be evaluated differently in foreign, as opposed to interstate, commerce. Compare Moorman Mfg. Co. v. Bair, 437 U.S. 267, 276-277 (1978), and Washington Revenue Dept., 435 U.S. at 746, with, *e.g.*, *Central R. Co.*, 370 U.S. at 615; Ott. 336 U.S. at 175; and Northwest Airlines, 322 U.S. at 326 (Stone, C.J., dissenting)." *Japan Line, supra*, 47 U.S.L.W. at 4482, note 17.

New Hampshire (420 U.S. 656 [1975]), it was held that the New Hampshire commuters income tax violated the constitutionally protected privileges and immunities of residents of Maine who worked in New Hampshire. New Hampshire sought to meet the challenge that the tax, which did not apply to residents of that State, discriminated against non-residents, on the ground that the tax on non-residents was interlocked with the credit granted under the income tax law of Maine to its own residents for income taxes paid to other States. The State argued that:

> "the only practical effect of the tax is to divert to New Hampshire tax revenues that would otherwise be paid to Maine, an effect entirely within Maine's power to terminate by repeal of its credit provision for income tax paid to another State." (420 U.S. at 666).

This Court rejected the argument, stating, *inter alia*:

> "Nor . . . can the constitutionality of one State's statutes affecting nonresidents depend upon the present configuration of the statutes of another State." (*Id.* at 668).

Accordingly, we submit that the potential for multiple taxation, rather than the actuality of multiple tax burdens, is the proper test of the constitutionality of State taxes under the Commerce Clause.

C. The Risks of Multiple Taxation Growing Out of the Diverse State Methods of Dividing Income, Found Constitutionally Tolerable in the Taxation of Operating Income From Interstate Commerce, Are Not Tolerable in the Case of Taxation of Dividends From Foreign Commerce.

In *Japan Line, supra*, the Court declared that "an inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instru-

mentalities of foreign, rather than of interstate commerce." For, as pointed out in *Bowman* v. *Chicago & N.R. Co.* (125 U.S. 465, 482 [1888]):

> "It may be argued, however, that, aside from such regulations as these, which are purely local, the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States."

The first inquiry that the Court made in *Japan Line* was "whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation" (*id.* at p. 4482), and it concluded that an apportioned tax on the containers would subject the foreign shipping lines to multiple taxation, since our courts have no power to prevent duplicative taxation by other countries.

Although there are factual differences between *Japan Line* and the case at bar, none warrants a difference in result. First, the fact that the taxpayers in *Japan Line* were international shippers and that Mobil is an international petroleum company, can be dismissed summarily. The Foreign Commerce Clause is not limited to international transportation.

The other difference in the factual patterns of the two cases, that *Japan Line* involved the risk of multiple taxation by a foreign country and one of the States of this country, whereas in the case at bar the risk is that of multiple taxation by more than one of the States, requires fuller consideration. To be sure, this Court has power to prevent multiple taxation by more than one State, whereas it is powerless to prevent taxation by a foreign country of income that is also taxable by a State. However, as this Court has construed its constitutional

role, it is not within its province to prevent multiple taxation of operating income from interstate commerce by two or more States as a result of the utilization by them of diverse or conflicting methods of apportionment. Because the "prevention of duplicative taxation . . . would require national uniform rules for the division of income" (*Moorman Manufacturing Co.* v. *Bair, supra,* 437 U.S. at 279), the Court has concluded that it has neither the constitutional power nor the institutional capacity to prescribe such apportionment rules. (*Ibid.*).

This limited constitutional posture has been adopted despite this Court's recognition that multiple taxation of income from interstate commerce will ensue. It has declared that "some risk of duplicative taxation exists whenever the States in which a corporation does business do not follow identical rules for the division of income", so that "the potential for attribution of the same income to more than one State is plain". (*Ibid.*).

The standards used by the Court in passing on the validity of various State formulas, or of their application to particular taxpayers as applied to interstate commerce, have allowed the States very wide latitude in devising their apportionment methods. "[R]ough approximation rather than precision" has sufficed to satisfy the Due Process and Commerce Clauses. (*Illinois Central Railway* v. *Minnesota,* 309 U.S. 157, 161 [1939]). "Unless a palpably disapportionate result comes from an apportionment", this Court has been unwilling "to nullify honest State efforts to make apportionments of income from interstate commerce". (*International Harvester Co.* v. *Evatt,* 329 U.S. 416 [1947]). As stated most recently in *Japan Line*:

> ". . . this Court consistently had held that the Commerce Clause 'does not call for mathematical exact-

ness nor for the rigid application of a particular formula; only if the resulting valuation is palpably excessive will it be set aside.' Northwest Airlines v. Minnesota, 322 U.S. at 325 (Stone, C.J., dissenting). Accord, Moorman, 437 U.S. at 274 . . ." (47 U.S.L.W. at 4483).

Accordingly, if this Court should exercise the same kind of restraint in reviewing State tax apportionment of foreign source dividends as it has shown in reviewing State apportionment of operating income from interstate commerce, Mobil will receive no protection from this Court with respect to duplicative State taxation of the foreign source dividends resulting from the diverse apportionment and allocation methods employed. *De facto* Mobil would receive no more protection from this Court against duplicative taxation of its foreign source dividends by the States of this country than this Court was able to provide the Japanese shipping lines with respect to duplicative taxation of their containers by foreign countries—which is no protection at all. The consequence would be that the foreign source dividends at issue would be subjected to a risk of multiple State taxation, which would be contrary to this Court's declaration that in the taxation of foreign commerce "overlapping of tax—a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." (*Japan Line, supra,* 47 U.S.L.W. at 4483).

D. *The Risk of Multiple Taxation of Foreign Commerce Created by the Vermont Tax Is Real and Substantial.*

That the risk of multiple State taxation of foreign source dividends is real and substantial becomes apparent from a consideration of the apportionment methods used by Vermont and other States. Of the 34 States that tax foreign source dividends, in whole or in part, 27 apportion some or all the dividends.[10] The potential for double taxation by the 27 States—in all of which Mobil, like many other multinational corporations do business[11]—is manifest from the diversity in the formulas employed by those States.[12]

[10] See Br. App. B, p. 4a.

[11] Mobil was subject to taxes measured by net income in 41 States and the District of Columbia. Stip. ¶ 8, App. 82.

[12] An examination of the formulas of the 27 States that apportion taxable dividends in whole or in part bears out this statement. In some States in which the Uniform Division of Income for Tax Purposes Act ("UDITPA"), (see CCH State Tax Guide, All States ¶ 10-000) has been adopted, the taxpayer has the option to use either UDITPA or the traditional formula. As a consequence, in Colorado, the taxpayer may employ either a two-factor property and receipts formula or the UDITPA three-factor formula (Br. App. C-1, p. 6a) and in Hawaii manufacturers or producers may use a two-factor property and payroll formula as an alternative to UDITPA. HAW. REV. STAT. §§235.5(e)(1), 235.21 *et seq.*, CCH 12-419, 92-431 *et seq.*

There is also variation in the weight given the factors employed. Thus, in Massachusetts and Wisconsin, the receipts factor is given a 50% weighting, whereas in most States that factor receives a 33⅓% weighting, equally with the property and payroll factors. Br. App. C-1, p. 6a.

There is also significant variation among the States in implementation of the same factors. Many States utilize the sales destination test for assigning receipts from sales of goods to the numerator of the State's receipts factor. Br. App. C-2, p. 8a. Vermont, however, employs a different test of sales attribution. It assigns receipts from sales to the State, if the goods are there located at the time of their appropriation to the order, under the so-called origin rule. *Ibid.*

In a good many States that use the sales destination test, a "throw back" rule is employed if the purchaser is the U.S. Government, or the taxpayer is not taxable in the purchaser's State. Under this rule, receipts from the sales revert to the State of origin, i.e., the State from which the goods were shipped. Br. App. C-2, p. 8a. Other States, however, do not use the throw back rule. See Maryland, New Jersey, Rhode Island. *Ibid.*

Some States attribute receipts from sales of goods under the sales negotiation or sales office rules. Thus, under the traditional

(Footnote continued)

That the amounts involved are of major significance to corporations engaged in foreign commerce is indicated by the fact that it has been estimated that foreign source dividends in the amounts of $2.2 billion from subsidiaries and $520 million from non-subsidiaries were included in the corporate tax base of the States in 1972.[13]

Colorado rule, which may be elected by the taxpayer, receipts from sales of goods are assigned to the State in which the sales negotiation activity took place. *Ibid.*

There are likewise numerous disparities in the property factors used by the States. In 22 of the 27 States that apportion foreign source dividends, the original cost of real and tangible personal property is used in the property factor. Br. App. C-5, p. 14a. Three States, New Jersey, Rhode Island and Vermont, use net book value. In Colorado (under its traditional formula) and Massachusetts, the depreciated Federal tax base is employed. *Ibid.* In Colorado, if the taxpayer elects to apportion income under UDITPA, the original cost of the property is used. *Ibid.*

Although most States include rented real and tangible personal property in the factor, the New Jersey Corporation Business Tax and the Colorado traditional formula ignore all rented property, and Vermont takes into account only rented real property. Br. App. C-3, p. 10a.

In a good many States inventory in transit between the taxing State and other States is included in the property factor of the States of destination of the goods, but in New Jersey, Rhode Island and Vermont, such goods are excluded entirely from the property factor. *Ibid.*

Since the apportionment factors result in a fraction that is applied to all the taxpayers' apportionable income, it is apparent that if the States were permitted to apportion foreign source dividends, there would be a substantial risk that duplicative taxation of the same income would occur. See *Moorman Manufacturing Co.* v. *Bair, supra,* 437 U.S. at 276.

[13] See Carlson, "State Taxation of Corporate Income From Foreign Sources", *Essays In International Taxation: 1976,* 231, 266, Department of the Treasury, Washington, D.C. (1976).

In 1973, more than 100,000 corporations reported net dividend income from foreign and domestic corporations on their Federal income tax returns. Internal Revenue Service, Statistics of Income —1973, Corporation Income Tax Returns, U.S. Government Printing Office (1977).

E. *The Traditional State Practice of Attributing Dividends Solely to the Taxpayer's Commercial Domicile Accords With Accepted Precepts of Fiscal Policy and Eliminates the Risk of Multiple Taxation of Foreign Source Dividends.*

1. History and the Judicial Decisions Support Taxation of Dividends Only by the State of Commercial Domicile.

The State of a corporation's commercial domicile has long been recognized as having the constitutional power to tax dividends in full, and there is no legitimate constitutional basis for depriving it of that power. Allocation of dividends to the taxpayer's commercial domicile, based on the doctrine of *mobilia sequuntur personam,* was the traditional method used in State taxation.[14] This is the current practice in a number of States.[15] Although the question has never been decided by this Court,[16] the power of the

---

[14] See the survey made in 1941 in Watson, "Allocation of Business Income for State Income Tax Purposes", 25 Minn.L.Rev. 851, 858-862. In a 1959 study, Professor Paul Hartman reported that of the 34 States then imposing corporate taxes measured by net income, specific allocation was provided by explicit provision in 15 of the States and the District of Columbia; in most cases the dividends were allocated to the State of the taxpayer's principal place of business or its domicile. "State Taxation of Corporate Income from a Multistate Business". 13 Vand.L.Rev. 21, 49, 59. In five other States the specific allocation provisions were less clear, but the author regarded them as broad enough to include dividends; in eight States there were no specific allocation provisions. *Id.* at p. 61. See, also, "State Taxation of Interstate Commerce", Report of Special Subcommittee on State Taxation of Interstate Commerce, House Judiciary Committee, Vol. 1, p. 204 *et seq.* (88th Cong. 2d Session H.R. No. 1480) (Willis Comm. Rep.).

[15] Arizona, California, Louisiana, Minnesota, Mississippi, Oklahoma and South Carolina allocate all taxable dividends to the State of commercial domicile. In 18 other States and the District of Columbia non-business dividends are likewise allocated to the commercial domicile. See Br. App. B, p. 4a.

[16] The decisions of this Court dealing with the taxation of shares of stock do, however, lend strong support to the view that the State of a corporation's domicile is empowered to tax dividends in

(Footnote continued)

State of a corporation's commercial domicile to tax the corporation's dividends, without apportionment, has been sustained over the years by intermediate Federal and by State courts.[17]

2. Fiscal Policy Considerations Underlying Jurisdiction to Tax Justify Taxation of Dividends Solely by the State of Commercial Domicile.

Fiscal policy considerations, as well as history, lend support to the recognition of the power of the recipient's State of commercial domicile to tax dividends in full and to the denial of the authority of other States to include the dividends in the apportionable bases of their taxes.

The State of a corporation's commercial domicile is, by definition, the seat of the control and management of its affairs, where the corporation's business and activities as the owner of the stocks in its subsidiaries, affiliates, and other corporations are customarily conducted. (See *Wheeling Steel Corp.* v. *Fox, supra; First Bank Stock Corp.* v. *Minnesota, supra.*) This is to be contrasted with the direct operating functions, such as manufacturing, producing and selling, typically carried on in many other States, activ-

full. In *First Bank Stock Corp.* v. *Minnesota,* 301 U.S. 234, 240 (1937), this Court said:

"... this Court has often upheld and never denied the constitutional power to tax shares of stock at the place of the domicile of the owner. Hawley v. Malden, 232 U.S. 1, 11, 12; Klein v. Board of Tax Supervisors, 282 U.S. 19, 24; Wright v. Louisville & Nashville R. Co., 195 U.S. 219; Kidd v. Alabama, 188 U.S. 730; Darnell v. Indiana, 226 U.S. 390."

[17] *Chestnut Securities Co.* v. *Oklahoma Tax Commission,* 125 F.2d 571 (C.A. 10th 1942), cert. denied, 316 U.S. 668 (1942); *Southern Pacific Company* v. *McColgan,* 68 Cal. App.2d 48, 156 P.2d 81 (1945); see *United Gas Corporation* v. *Fontenot,* 241 La. 488, 129 So.2d 748 (1961); *Pacific Telephone and Telegraph Company* v. *Franchise Tax Board,* 102 Cal. Reptr. 782, 498 P.2d 1030 (1972).

ities that have nothing to do with the taxpayer's holding and management of its stocks or the dividend income they produce.

To deprive the State of commercial domicile of the power of taxation of the corporation's foreign source dividends to the extent that the income is spread under an apportionment formula among the other States, would be inherently distorting. As illustrated by the facts of the instant case, the non-domiciliary States are not the source of Mobil's foreign source dividend income. They provide Mobil no benefits or protection, and they incur no social costs in furnishing any public services to Mobil with respect to the company's ownership or management of the stock of its foreign subsidiaries and non-subsidiaries, or to Mobil's handling and disposition of the foreign source dividend income. (Stip. ¶¶7, 9, and 11, App. 82-83).

Tested by any of the accepted fiscal policy norms on which jurisdiction of the States to impose income taxes on a corporation is grounded—the source of the income, the benefits and protection afforded, or the costs of the business to the State (see *Curry* v. *McCanless,* 307 U.S. 357, 367-368 [1939]; *Wisconsin* v. *J.C. Penny Co.,* p. 444, *supra; Shaffer* v. *Carter,* 252 U.S. 37, 49-53 [1940]),[18] the claim of the State of commercial domicile to tax in their entirety the dividends of a corporation, all of whose business and activities as a holding and investing company are conducted in that State, is very compelling, whereas the claim of the States in which only manufacturing, selling or other operating functions are carried on to tax the dividends on an apportioned basis is without justification.[19]

[18] One tax economist, Professor John A. Wilkie of the University of Wisconsin, has set forth "four major different bases for the uniform and reasonable determination of tax jurisdiction" of corporate income as follows:

(Footnote continued)

In the opinion below, it was stated that, "[i]f Mobil's Commerce Clause argument prevailed, Mobil and similar

"(1) the 'source of income' basis . . .; (2) the 'activities of the corporation or its representative in whatever capacity' basis . . .; (3) the 'property sited and activities carried on' basis . . .; and (4) the 'property sited and regular place of substantial business' basis." ["A Basis for Taxing Corporate Net Income", 36 Taxes 807, 815 (1958)].

In elaborating on the source of income basis for taxation, Professor Wilkie declared that it should include the income from:

"(4) any securities . . . or other intangible property which have a 'business situs' within the state, which arise out of unitary business activities within the state (such as accounts receivable or bank deposits), or which are 'stock in trade' in business activities within the state; (5) any securities . . . or other intangible property not included in (4) above, and which are owned by a corporation whose commercial domicile . . . is within the state." (*Id.* at 816.)

[19] Since Mobil's commercial domicile was located in New York, the State under whose laws it was incorporated, this case does not present the question as to the extent to which the State of incorporation should be recognized as empowered to tax dividends in a case in which the corporation has established its commercial domicile in another State. See *United States Glue Co.* v. *Town of Oak Creek*, 247 U.S. 321 (1918); *Cream of Wheat Co.* v. *County of Grand Forks*, 253 U.S. 325 (1920); the concurring opinion of four Justices in *Newark Fire Insurance Co.* v. *State Board*, 307 U.S. 313 (1939); 1 Willis Comm. Rep. at p. 160, note 14, *supra*.

If intangibles have become an integral part of a business carried on in a State, they acquire a "business situs" and may be taxed in that State. *New Orleans* v. *Stempel*, 175 U.S. 309, 316 (1899); *Liverpool L. & G. Insurance Co.* v. *New Orleans*, 221 U.S. 346 (1911); see *First Bank Stock Corp.* v. *Minnesota*, 301 U.S. 234, 237 (1937). *Newark Fire Insurance Co.* v. *State Board of Tax Appeals*, 307 U.S. 313, 319-321 (1939). In accordance with that doctrine, the principle that foreign source dividends are taxable in the State of the recipient's commercial domicile lends itself to an exception for dividends on stock that has acquired a business situs in another State. That State could properly be substituted for the recipient's domicile as the State entitled to tax the dividends in full. In point of fact, that rule as to the treatment of dividends obtains in some States. See Ariz. Rev. Stat. § 43-135(g), CCH 12-405; La. Rev. Stat. Ann. § 243(4), CCH 12-411; Okla. Stat. Tit. 68, § 2358A.-3.-b., CCH 12-425. The business situs question, however, does not arise in the case at bar, since Mobil's stocks in the foreign corporations whose dividends are at issue in this case had no business situs in Vermont. Stip. ¶11, App. 83.

corporations could effectively avoid taxation of the majority of their taxable income if the commercial domicile for any reason declined to tax to the full measure of its ability." The statement was presumably based on the fact that New York does not tax all dividends and that some States tax no dividends. (See Br. App. B, p. 5a).[20] The Vermont court has ignored the fact that the franchise or income tax is not the only State tax to which corporations are subject. A proper perspective requires consideration of the entire tax structure of the States and localities involved.

New York has one of the heaviest State and local tax burdens in the country, collecting annual per capital taxes of $1,252, as compared with the median of $749 for all States.[21] Corporations doing business in New York City, where Mobil's principal office is located (Stip. ¶7, App. 82), are subject to both a State and a New York City tax on their net income, to both State and City sales and use taxes and high property and other taxes.[22]

[20] Kentucky, Michigan, Missouri, Pennsylvania and West Virginia, which also impose income taxes, do not include any dividends in the tax base. See Ky. Rev. Stat. § 141, CCH 10-400, 410; Mich. Comp. Laws § 208, CCH 15-300, 304; Mo. Rev. Stat. § 143, CCH 10-400, 435; Pa. Stat. Ann. Tit. 72, CCH 10-700; W. Va. Code § 11-24-6, CCH 10-700, 715. In addition, Georgia, Florida and Ohio omit foreign source dividends from the tax base. See Br. App. B, p. 5a.

[21] The figures are for 1976-1977, the latest available. The New York per capita tax load is the highest in the country, except for Alaska. See "Governmental Finances in 1976-1977", p. 64, Bureau of Census, U.S. Dept. of Commerce (GF 77, No. 5).

[22] The following table summarizes the major taxes, in addition to property taxes, to which New York City businesses are subject:

Tax	*Rate*
New York State corporation franchise tax on net income (Art. 9-A)	10%
New York City general corporation tax on net income (Ch. 46, Tit. R)	9%

(Footnote continued)

Moreover, it is the prerogative of the State of commercial domicile to waive taxation, in whole or in part, of dividends properly within its province in order to effectuate its social or economic policies. The New York policy of partially exempting dividends from tax is counterposed by the imposition of other heavy taxes on corporations. That should not increase the constitutional power of other States to tax the dividends. (*Austin* v. *New Hampshire*, *supra*).

3. Commerce Clause Decisions of This Court Support Limitation of the Taxation of Foreign Source Dividends to a Single State to Avoid Multiple Taxation.

The affirmation of the power of the State of the commercial domicile to tax foreign source dividends, to the exclusion of other States, also finds support in the precedents of this Court in the resolution of other Commerce Clause taxation issues.

In the taxation of interstate sales, the Court recognized that, in the silence of Congress, the risk of multiple taxation required the power be lodged exclusively in one State. The Court has sustained the power of the States to impose on an out-of-State vendor (which has an adequate nexus with the State) the duty to collect a use tax on goods sold and shipped from other States to customers within the State.

Tax	*Rate*
New York City commercial rent and occupancy tax (Ch. 46, Tit. L)	6¾% on rent in excess of $11,000
New York State sales and use tax (Art. 28)	4%
New York City sales and use tax (Ch. 46, Tit. A)	4%

The references to New York State taxes are to the New York Tax Law, and the references to New York City taxes are to the City's Administrative Code.

As Mr. Justice Rutledge analyzed the matter in a leading sales-use tax opinion:

> ". . . the risk of multiple taxation creates the unconstitutional burden which actual taxation by both states would impose in fact.
>
> • • •
>
> "Where the cumulative effect of two taxes, by whatever name called, one imposed by the state of origin, the other by the state of market, actually bears in practical effect upon such an interstate transaction, there is no escape under the doctrine of undue burden from one of two possible alternatives. Either one tax must fall or, what is the same thing, be required to give way to the other by allowing credit . . ., or there must be apportionment. Either solution presents an awkward alternative. But one or the other must be accepted unless that doctrine is to be discarded and one of two extreme positions taken, namely, that neither state can tax the interstate transaction or that both may do so until Congress intervenes to give its solution for the problem. It is too late to accept the former extreme, too early even if it were clearly desirable or permissible to follow the latter.
>
> As between apportionment and requiring one tax to fall or allow credit, the latter perhaps would be the preferable solution. And in my opinion it is the one which the Court in effect, though not in specific statement, adopts." See Mr. Justice Rutledge's single opinion in *McLeod* v. *Dilworth Co.*, 322 U.S. 327, 349, at 360, *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, and *International Harvester Co.* v. *Evatt*, 329 U.S. 416 (1917).

As a consequence of this judicial resolution of the multiple taxation problem in the interstate sales-use tax area,

interstate sales, like intrastate sales, are subject to tax, and the "out-of-state seller runs no risk of double taxation." (*National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 558 [1977]).

More recently, in the taxation of shipping containers used in foreign commerce and owned by foreign corporations based in other countries, this Court found it necessary once more to make a choice, this time in order to avoid multiple property taxation that is repugnant to the Foreign Commerce Clause. The Court chose to recognize as paramount the "right" and the "power" of the foreign countries in which the shipping lines were incorporated and maintained their principal places of business and commercial domiciles "to tax the containers in full". (*Japan Line, supra*, 47 U.S. L.W. at 4482). Accordingly, a California property tax on the shipping containers used in that State was invalidated because "notwithstanding apportionment", the tax "creates a substantial risk of multiple international taxation". (*Ibid.*).

4. Affirmation of the Sole Power of the State of the Commercial Domicile to Tax Foreign Source Dividends Is Not Inconsistent With the *Moorman* Case.

Affirmation by this Court of the rule that the State of a corporation's commercial domicile has the constitutional power to tax in full foreign source dividends received by a corporation engaged in foreign commerce, and that the other States in which the corporation conducts its business may not include such dividends within the apportionable bases of their taxes, is not inconsistent with the Court's approach to State tax apportionment of interstate income taken in the *Moorman* case.[23] A compelling factor in the

[23] The instant case does not present the issue as to whether the principles of the *Moorman* case should be extended to the division

(Footnote continued)

Court's unwillingness to strike down the Iowa apportionment formula was that the "prevention of duplicative taxation would require national uniform rules for the division of income." (437 U.S. at 279). The controversy in the instant case does not lie in a constitutional challenge to one method of apportionment as compared with others, but instead to the power of any State other than that of the taxpayer's commercial domicile to tax the foreign dividend income, whatever may be its method of apportionment. Consequently, a decision invalidating the Vermont tax does not involve the Court in prescribing uniform apportionment rules. Instead, the Court is asked to follow its precedent established in interstate sales and use taxation and the analogous method employed in passing on the taxation of property used in the foreign commerce, by holding that, under the Foreign Commerce Clause, one State and one State alone—the State of the corporation's commercial domicile—may tax dividends arising out of foreign source earnings, and that State may tax them in full.

of operating income of an international enterprise. State taxation of dividends arising from foreign source earnings raises different questions from State taxation of direct operating income of a United States corporation arising from operations abroad. That is because, *inter alia*, unlike the attribution of operating income, dividend income is allocated *in toto* by some States to the recipient's commercial domicile, whereas other States apportion dividend income in accordance with their formulas. See Br. App. B, p. 4a. No State seeks to tax in full the operating income of a foreign corporation conducting business within and without the State.

III.

The Vermont Tax Should Be Invalidated on the Ground That It Conflicts With Established Federal Policy in Regulating Foreign Commerce.

The primacy and predominance of the Federal Government in dealing with this country's foreign relations, including commerce with other countries, are so well established as to require little more than a statement of the principle. One need only mention the role played by the National Government in such areas as reciprocal Customs exemptions, Export-Import Bank loans, insurance against expropriation of investments in foreign countries, the Inter-American Development Bank, the Foreign Assistance Act, the Asian Development Bank, the General Agreement on Tariffs and Trade (GATT), the Trade Act of 1974, the Webb-Pomerene Act, international shipping and air transportation, the network of United States tax treaties with countries over the world, and the special provisions of the Internal Revenue Code enacted to encourage foreign commerce.[24]

[24] See Customs Convention on Containers, 20 U.S. Treaties and Other International Agreements 301, Treaties and Other International Acts Series No. 6634 (1956); Export-Import Bank Act of 1945, 12 U.S.C. § 635 *et seq.* (1945); Inter-American Development Bank Act, 22 U.S.C. § 283 *et seq.* (1959); Foreign Assistance Act of 1961, 22 U.S.C. § 2351 (1961); Asian Development Bank Act, 22 U.S.C. § 285 *et seq.* (1966); General Agreement on Tariffs and Trade (GATT), 61 Stat. A3, Treaties and Other International Acts Series No. 1700 (1947); Trade Act of 1974, § 2, 19 U.S.C. § 2101 (1974); Webb-Pomerene Act, 15 U.S.C. § 61 *et seq.* (1964); Convention for Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), 49 Stat. 3000, Treaty Series No. 876 (1935); Export Administration Act of 1969, § 3, 50 U.S.C. § 2401 (1969); note 29, p. 41, *infra;* notes 31 and 32, pp. 42-43, *infra.*

Because "[f]oreign commerce is preeminently a matter of national concern", this Court has recognized the constitutional precept that "'In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.' Board of Trustees v. United States, 289 U.S. 48, 59 (1933)." (*Japan Line, supra,* 47 U.S.L.W. at 4481).

A. *Taxation of Dividends Derived From Foreign Commerce by a State Other Than the Recipient's Commercial Domicile Creates a Risk of Multiple Taxation Incompatible With the Established Federal Policies of Avoiding Double Taxation* of Foreign Source Income and Encouraging the Payment of Foreign Dividends.

1. There Is a Long-Established Congressional Policy of Encouraging Foreign Commerce by the Elimination of Double Taxation of Foreign Source Income.

For decades, Congressional tax legislation has been based on the policy that foreign commerce conducted by United States based enterprises should be fostered by eliminating double taxation of income from foreign sources. This has been done in part under the Federal income tax by granting to United States domestic corporations credits against income taxes paid to foreign governments. (I.R.C., §§ 901-904). The credit is granted not only for income taxes paid by the taxpayer to foreign governments, but it likewise extends to foreign income taxes paid by foreign corporations in which the taxpayer holds at least 10% of the voting stock (I.R.C., § 902). This "indirect credit" comes into play at the time the income of the foreign corporation is paid or deemed paid to the United States corporation as a dividend. (*Ibid.*).

Double taxation at the corporate level of dividends paid by domestic corporations out of foreign source earnings to United States corporations is fully or partially avoided

under the Federal income tax by the general treatment of dividends from domestic corporations, whether based on United States or foreign source earnings. Dividends received by a United States corporation from 80% or more owned domestic subsidiaries are entirely exempted from tax; and only 15% of the dividends received from less than 80% owned domestic corporations are taxed. (I.R.C., § 243).

The Congressional policy of eliminating double taxation of foreign source earnings has been in force since the Revenue Act of 1918.[25] As characterized by the Treasury Department, the policy was designed "to avoid burdensome double taxation and to encourage foreign trade." [26] Assistant Secretary of the Treasury for Tax Policy Stanley Surrey described the importance of this policy in the following words:

> "American investment would not proceed at all without the foreign tax credit because then, as the chairman pointed out, two taxes would be imposed and the overall burden of two taxes would be so great that international investment would practically cease." [27]

---

[25] See 1918, 1921, 1924 and 1926 Acts, §§ 222, 238; 1928, 1932, 1934, 1936, 1938 Acts; 1939 Act, § 216 and the provisions of the IRC of 1954 cited in the text.

The credit came into the Federal income tax law in the Revenue Act of 1918 for both individuals and domestic corporations (§§ 222, 238). In reporting the provision, Congressman Kitchin, the spokesman for the House Ways and Means Committee, stated on the floor of the House:

> "That is not only a just provision but a very wise one. It is wise from the standpoint of the commerce of the United States, of the expansion of business of the United States. . . . We would discourage men from going out after commerce and business in different countries . . . if we maintained this double taxation." Seidman's Legislative History of Federal Income Tax Laws, 1938—1861, p. 928 (1938).

[26] House Ways and Means Committee Report, Revenue Bill of 1934, pp. 15-16 (H.R. Rep. No. 704, 73rd Cong. 2d Sess.).

[27] Hearings on United States-Brazil Tax Treaty, Senate Foreign Relations Committee, pp. 19-20 (90th Cong. 1st Sess., Oct. 5, 1967).

Congressional Committees have repeatedly recognized the importance of the Federal "obligation to insure that double taxation [of foreign source income] does not result." [28]

There is a whole series of other tax measures enacted by Congress that are likewise designed to encourage foreign commerce.[29]

---

[28] Tax Reform Act of 1976, Senate Finance Committee Report on H.R. 10612, p. 233 (S.Rep. No. 94-938, 94th Cong. 2d Sess.); see General Explanation of the Tax Reform Act of 1976, Staff, Joint Committee on Taxation, H.R. 10612 (94 Cong. Pub. L. 94-455); Tax Reform Act of 1975, House Ways and Means Committee, Report on H.R. 10612 (H.Rep. No. 94-658, 94 Cong. 1st Sess.).

[29] The following sections of the Internal Revenue Code contain special preferential provisions designed to encourage foreign commerce by United States based corporations.

(a) 10-year operating loss carryforward in the case of a foreign expropriation loss (as defined in section 172(h)). § 172(b)(1)(D).

(b) Reciprocal exemption for earnings from the operation of foreign flag ships and aircraft and earnings from the use on a temporary basis of railroad rolling stock of foreign corporations. § 883.

(c) Increased taxation on nationals, residents, and corporations of foreign countries that impose more burdensome taxes or discriminatory taxes on citizens of the United States or U.S. corporations. § 896.

(d) Exclusions and deductions to citizens and residents of the United States present in a foreign country. §§ 911-913.

(e) Preferential treatment of Export Trade Corporations under Subpart F. §§ 970-971.

(f) Special tax benefits for Domestic International Sales Corporations. §§ 991-997.

(g) Tax benefit rule for the recovery of foreign expropriation losses. § 1351.

See also, Slowinski, "Federal Taxation and Foreign Policy", 20 U. of Fla. L. Rev. 489 (1968).

2. The Policies of Avoiding Double Taxation and Encouraging the Payment of Dividends Are Embodied in a Network of United States Tax Treaties.

The elimination of double taxation of foreign source income of American based companies has also become part of the standard fabric of United States tax treaties with foreign countries. As stated by Assistant Secretary of the Treasury for Tax Policy Edwin S. Cohen:

> "We have at the present time some 20 income tax treaties with foreign countries and about a dozen estate tax treaties, and we consider that these are quite important for the purpose of preventing double taxation by two or more countries of income and estates, and by eliminating this double taxation we remove fiscal barriers to international trade and investment." [30]

Most of the United States foreign tax treaties provide for removal of fiscal barriers to international trade or investment by guaranteeing U.S. corporate shareholders of foreign affiliates a credit for taxes paid to foreign governments.[31] They also provide for reductions in the rate of the foreign country's withholding tax imposed on United States shareholders with respect to dividends paid by local

[30] Hearings on Tax Conventions with Belgium, Finland, Trinidad and Tobago, and The Netherlands, Senate Foreign Relations Committee, p. 2 (91st Cong. 2d Sess., Oct. 6, 1970); see also Patrick, "A Comparison of the United States and OECD Model Income Tax Conventions", Law and Policy in International Business: Issues in International Taxation, 10 Intl. J. of Georgetown University Law Center 613 (1978).

[31] See, *e.g.*, United States Tax Treaties with Australia Art. XV, Belgium Art. 23, France Art. 23, The Federal Republic of Germany Art. XV, Japan Art. 5, United Kingdom Art. XIII and Netherlands Art. XIV. The text of the treaties is published in CCH Federal Tax Treaties. See also Patrick, note 30 *supra*, at 695-701.

companies.[32] These treaties serve not "only the purpose of encouraging investments" in foreign countries by United States enterprises, but also "the purpose of encouraging the payment of dividends, interest and royalties back to the United States because it lessens the double taxation of that income." [33]

3. Multiple State Taxation of Foreign Source Dividends Is Incompatible With the Federal Policies.

Because the States, unlike the Federal government, are not empowered to tax the global income of corporations (at least of corporations not domestic to the State), a different method is used by the States to deal with double taxation—the allocation and apportionment method. In theory, this method is designed to tax only the income attributable to the State, and thereby avoid overlapping State taxation of income. In practice, however, as the Court recognized in *Moorman, supra,* multiple taxation results from diverse State allocation and apportionment techniques. Because no State allows a foreign tax credit against the dividends it taxes, the consequence of the conflicting State rules is a clear and present danger of multiple State taxation of dividends derived from foreign earnings.

It is our contention that multiple taxation of foreign source dividends at the State level is not compatible with

[32] See, *e.g.*, United States Tax Treaties with Australia Art. VII, Belgium Art. 10, Canada Art. XI, France Art. 9, The Federal Republic of Germany Art. VI and Japan Art. 12. See also U.S. Treasury Department's Model Income Tax Treaty of March 17, 1977, Art. 10. CCH Federal Tax Treaties, ¶153; Draft Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital, Organization for Economic Cooperation and Development, *id.* ¶151.

[33] Testimony of Dr. Laurence Woodworth, Chief of Staff, Joint Committee on Taxation, Hearings, note 30 *supra*, at 45.

the established Federal policies of encouraging foreign commerce by eliminating duplicative national taxation of foreign source dividends and fostering payment of dividends from foreign sources.

We are not unmindful of the fact that there is no declaration in any Federal statute explicitly prohibiting taxation by more than one State of dividends derived from foreign commerce. However, this Court has not adopted so stringent a standard in determining whether State legislation is in conflict with Federal policy. Instead, the test as stated in a case passing on a Pennsylvania statute, is as follows:

> "Our primary function is to determine whether . . . Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines* v. *Davidowitz,* 312 U.S. 57, 67 [1941]).

In *McGoldrick* v. *Gulf Oil Corporation,* (309 U.S. 414 [1940]), the taxpayer attacked a New York City sales tax imposed on sales of fuel oil made by the company to the owners of vessels engaged in foreign commerce. Gulf imported crude oil from Venezuela, and entered it with the U.S. Custom Service under bond. The Federal statute authorized the importation of crude oil duty free, if the oil was placed under bond in the importer's warehouse for export, or for manufacture of fuel oil by the importer and the sale as ships' stores to vessels engaged in foreign commerce. The fuel oil in controversy had been manufactured in New York City by Gulf; no Federal duty was payable because the statutory exemption procedures had been complied with. Gulf challenged the New York City sales tax on sales of fuel oil to ocean going vessels as conflicting with that policy. This Court agreed, and invalidated the tax, saying:

> "As we have seen, the exemption and drawback provisions were designed, among other purposes, to relieve the importer of the import tax so that he might meet foreign competition in the sale of fuel as ships' stores. . . . It is evident that the purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress, and which might equal or exceed the remitted import duty. . . . The Congressional regulation, read in the light of its purpose, is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise shall not become a part of the common mass of taxable property within the state, pending its disposition as ships' stores and shall not become subject to the state taxing power. . . . The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce." (309 U.S. at 428-429).[34]

[34] That the exercise by the Federal Government of its taxing powers may at the same time involve the exercise of its power to regulate commerce was also reflected in a decision of a California Appellate Court. In invalidating a local property tax imposed on liquor distilled in Baltimore and shipped to San Francisco, where it was held in a United States Customs bonded warehouse for export, a California Appellate Court also applied the principle enunciated in the *Gulf Oil Corporation* case:

> "Appellant argues that the purpose of the strict governmental regulations under which the liquor is held is to prevent the diversion of the liquor to the domestic market without the payment of the Internal Revenue Tax. It seems obvious that this is one of the purposes of these regulations. However this does not necessarily mean, as appellant seems to imply, that these regulations constitute an exercise only of the taxing power to the exclusion of the commerce power. The Gulf Oil case indicates that appellant's position on this point is not well taken." *National Distillers Products Corp.* v. *City and County of San Francisco,* 141 Cal. App. 2d 651, 297 P.2d 61, 65 (1956).

In *Japan Line, supra,* the Court invalidated a State property tax on the ground that the levy would frustrate Federal policy, even though there was no Federal statute explicitly so providing. There, the Court concluded that State property taxation, albeit on an apportioned basis, of shipping containers used in foreign transportation by Japanese shippers, whose commercial domicile was located in Japan, was repugnant to the Customs Convention on Containers signed by the United States and Japan and to the international practice of taxing such containers in full by the country in which the shipping line is based.

Each of those cases, like the case at bar, involves its own particular business, State tax and Federal policy. Nevertheless, a common thread runs through all three situations, namely, that a State tax impinges on an established Federal policy regulating foreign commerce, and the crucial question is whether the State tax tends to frustrate that policy. We suggest that, just as the New York sales tax was found to frustrate the Federal customs exemption granted by Congress to oil importers, and the California apportioned property tax on containers was found to frustrate the Customs Convention and relations to other shipping nations, so the Vermont apportioned tax on the foreign source dividends of an out-of-state corporation engaged in foreign commerce, whose commercial domicile is not in Vermont, would frustrate Federal policies. The Vermont tax is "an obstacle to the accomplishment and execution of the full purposes and objectives" (*Hines* v. *Davidowitz, supra*) of Congressional legislation and U.S. tax treaties eliminating double taxation of income earned abroad and encouraging the payment of foreign dividends to U.S. corporations.

The incompatibility of the Vermont tax with Federal policy is likewise reflected in precepts developed by this Court in adjudging the validity of State taxes on interstate commerce. It has long been established in the taxation of interstate commerce that a State tax which imposes an "undue burden" on the commerce violates the Commerce Clause.[35] One of the resulting "corollary formulations" made by this Court is that a State tax which subjects interstate commerce to a risk of multiple taxation is an undue burden on the commerce.[36] As the analysis made above indicates, the diverse apportioned State taxes on foreign source dividend income by each of the States in which a corporation conducts business, coupled with the power of the State of commercial domicile to tax the dividends in full, would, indeed, subject a corporation engaged in foreign commerce receiving such dividends to a risk of multiple taxation of the income. (See pp. 26-30, *supra*). State taxation that subjects foreign commerce to the risk of undue tax burdens can hardly be regarded as compatible with the Federal policies of encouraging foreign trade and the payment of foreign source dividends by preventing double taxation of income. Duplicative State income taxation must inevitably, to some extent, constitute a disincentive to foreign trade and the payment of dividends, and thereby frustrate Federal policy.

The accommodation of State income taxation of foreign source dividends received by corporations engaged in foreign commerce to the Federal policies of eliminating multiple taxation and encouraging the payment of dividends from foreign source income cannot be accomplished if the States should be empowered to tax the dividends under their diverse apportionment formulas. Single taxation at

---

[35] " * * * The long history of this problem boils down in general statement to the formula that the states, by virtue of the force of the commerce clause, may not unduly burden interstate commerce." (Rutledge, J. in *McLeod* v. *Dilworth, et al.*, p. 18, supra, 322 U.S. at 358).

[36] *Ibid.;* see also *Northwestern States Portland Cement Co.* v. *Minnesota* and *Williams* v. *Stockham Valves & Fittings, Inc.*, 358 U.S. 450, 461 (1959).

the State level can be accomplished only by recognition of the power of one State, and one State alone, to tax the foreign source dividends in full. The history of State taxation and the fiscal policy considerations underlying the power of taxation point unmistakably to the recognition that the power to tax foreign source dividends is lodged in the State of the recipient corporation's commercial domicile, and that State alone.

Accordingly, it is respectfully submitted that the Vermont tax should be stricken down as being repugnant to established Federal policies.

CONCLUSION

The decree of the Vermont Supreme Court should be reversed, with directions to set aside the assessment to the extent that foreign source dividends have been included in the apportionable base of the tax at issue.

Dated: June 26, 1979

Respectfully submitted,

JEROME R. HELLERSTEIN
80 Pine Street
New York, New York 10005
(212) 344-1279

JOHN DWIGHT EVANS, JR.
150 East 42nd Street
New York, New York 10017
(212) 883-4965

Attorneys for Appellant

Of Counsel:

WILLIAM B. RANDOLPH
80 Pine Street
New York, New York 10005

APPENDICES TO BRIEF

APPENDIX A

Statutes

Vermont Statutes Annotated, Title 32:

Section 5811 (18). "Vermont net income" means, for any taxable year and for any corporate taxpayer, the taxable income of the taxpayer for that taxable year under the laws of the United States, excluding income which under the laws of the United States is exempt from taxation by the states. However, "Vermont net income" shall not include the "gross-up dividends" required by the federal Internal Revenue Code to be taken into taxable income in connection with the taxpayer's election of the foreign tax credit. In the case of an "electing small business corporation" ("Subchapter S Corporation") under the laws of the United States, "Vermont net income" shall include only the taxable income of the corporation which is distributed to, or is undistributed to but allocable under the laws of the United States to, shareholders during the time while they are not residents of the state of Vermont. (Am. L. 1971, A. 73.)

. . .

Section 5833. Allocation and apportionment of income—(a) If the income of a taxable corporation is derived from any trade, business, or activity conducted entirely within this state, the Vermont net income of the corporation shall be allocated to this state in full. If the income of a taxable corporation is derived from any trade, business or activity conducted both within and without this state, the amount of the corporation's Vermont net income which shall be

apportioned to this state, so as to allocate to this state a fair and equitable portion of that income, shall be determined by multiplying that Vermont net income by the arithmetic average of the following factors:

(1) The average of the value of all the real and tangible property within this state (A) at the beginning of the taxable year and (B) at the end of the taxable year, (but the commissioner may require the use of the average of such value on the fifteenth or other day of each month, in cases where he determines that such computation is necessary to more accurately reflect the average value of property within Vermont during the taxable year), expressed as a percentage of all such property both within and without this state; (Am. L. 1971, c.73.)

(2) The total wages, salaries, and other personal service compensation paid during the taxable year to employees within this state, expressed as a percentage of all such compensation paid whether within or without this state.

(3) The gross sales, or charges for services performed, within this state, expressed as a percentage of such sales or charges within or without this state.

(b) If the application of the provisions of this section does not fairly represent the extent of the business activities of a corporation within this state, the corporation may petition for, or the Commissioner may require, with respect to all or any part of the corporation's business activity, if reasonable: (1) Separate accounting; (2) The exclusion or modification of any or all of the factors; (3)

The inclusion of one or more additional factors which will fairly represent the corporation's business activity in this state; or (4) The employment of any other method to effectuate an equitable allocation and apportionment of the corporation's income. (Am. L. 1971, A. 73.)

APPENDIX B

Allocation or Apportionment of Dividends Included in the Tax Base*

State[1]	All Taxable Dividends Allocated to Commercial Domicile	Non-Business Dividends Allocated to Commercial Domicile and Business Dividends Apportioned	All Taxable Dividends Apportioned
Alabama		X	
Alaska		X	
Arizona	X		
Arkansas		X	
California	X		
Colorado		X	
Delaware			X
District of Columbia		X	
Hawaii		X	
Idaho		X	
Illinois		X	
Indiana		X	
Kansas		X	
Louisiana	X		
Maine		X	
Maryland			X
Massachusetts			X
Minnesota	X		
Mississippi	X		
Montana		X	
Nebraska		X	
New Hampshire			X
New Jersey			X
New Mexico		X	
North Carolina		X	
North Dakota		X	
Oklahoma	X		
Oregon		X	
Rhode Island			X
South Carolina	X		
Tennessee		X	
Utah		X	
Vermont			X
Wisconsin			X
Total[2]	7	19	8

Appendix B

* This table includes only jurisdictions which include foreign source dividends, in part or in whole, in the tax base. Georgia, Florida and Ohio have been omitted because foreign source dividends are not taxable (Ga. Code §92-3102, CCH 10-512, 11-512), or they are taxable only if the payor transacts a substantial portion of its business, or has a substantial portion of its assets, in the United States (Fla. Stat. §220.13, CCH 10-310), or has physical assets located in the State (Ohio Rev. Code Ann. §5733, CCH 10-309, 336, 378, 11-425).

1. Ala. Code Tit. 40, §40-18-34, CCH 10-535, 15-090; Alaska Stat. §§43.19.010, 43.20.065, CCH 12-417, 418; Ariz. Rev. Stat. §43-135(g), CCH 12-405; Ark. Stat. Ann. §§84-2055(a), 2058, 2061, 2063, CCH 11-537, 572; Cal. Rev. & Tax. Code §25126, CCH 12-428; Colo. Rev. Stat. §24-60-1301, CCH 12-538; Del. Code Tit. 30, §1903(b)(6), CCH 10-840; D.C. Code §47-1580(a), CCH 12-405, 413; Haw. Rev. Stat. §§235-22, 27, 29, CCH 12-530, 540; Idaho Code §63-3027(g), (i), CCH 12-490, 510; Ill. Rev. Stat. Ch. 20, §301, 304, CCH 90-907, 916; Ind. Code Ann. §6-3-2-2, CCH 12-405, 415, 448; Kan. Stat. §§79-3274, 3277, 3279, CCH 12-478, 490; La. Rev. Stat. Ann. §243, CCH 12-411; Me. Rev. Stat. Tit. 36, §§5211(6), (8), CCH 12-460, 465; Md. Ann. Code Art. 81, §316(e), CCH 12-410, 420; Mass. Gen. Laws Ann. Ch. 63, §38(a)(1), (c) CCH 10-324, 330; Minn. Stat. §290.17, CCH 12-407; Miss. Code Ann. §27-7-23(1)(a); Miss. Inc. Tax Reg. §1.27-7-23(1), CCH 12-405, 407, 435; Mont. Rev. Codes Ann. §84-1503, CCH 11-501(c), (f), (h); Neb. Rev. Stat. §77-2735(4), 2741, 2743, CCH 12-425, 445, 455; N.H. Rev. Stat. Ann. §77-A:3, CCH 15-350, 355; N.J. Rev. Stat. §54:10A-6, CCH 5-805, 810; N.M. Stat. Ann. §§72-15A-20, 23, CCH 12-425, 455; 465; N.C. Gen. Stat. §105-130.4(c), (f), (i), CCH 10-805, 820; N.D. Cent. Code §57-38.1, CCH 12-454, 460, 464; Okla. Stat. Tit. 68, §2358A, CCH 12-425; Or. Rev. Stat. §314.625, 640, 650, CCH 12-414, 418, 422; R.I. Gen. Laws §44-11-14, CCH 10-810; S.C. Code §12-7-1120, CCH 12-435; Tenn. Code Ann. §67-2709, 2712, 2714, CCH 12-419, 425, 429; Utah Code Ann. §59-13-81, 84, 86, CCH 11-515, 530, 540; Vt. Stat. Ann. Tit. 32, §5833(a), CCH 12-410; Wis. Stat. Ann. §71.07(1m)(2), CCH 12-404(a), 409. All CCH references are to the relevant paragraphs in the Commerce Clearing House, Inc. State Tax Reporter Service.

2. Four States that tax foreign source dividends have been omitted from the table because their methods of allocation or apportionment do not fit into the scheme used by most States.

Connecticut: Allocates dividends from subsidiaries by reference to the ratio of the payor's business done in the State; non-subsidiary dividends are apportioned if they constitute an integral part of the recipient's regular business operations (Conn. Gen. Stat. §12-218, CCH 10-815, 825).

Iowa: There appears to be a conflict between the statute and the rules as to the extent to which dividends are allocated or apportioned (Iowa Code §422.33, CCH 12-520; Iowa Rule 54.2(1), CCH 12-522).

New York: Includes in the tax base only non-subsidiary dividends (to the extent of 50%), which it allocates in the ratio of the payor's New York apportionment percentages (N.Y. Tax Law §210, CCH 5-829—841, 9-581).

Virginia: Dividends of non-subsidiaries are allocated to the State if it is the recipient's commercial domicile; dividends paid by subsidiaries are apportioned (Va. Code §58-151.040, CCH 12-445).

APPENDIX C-1

Chart of State Rules On Allocation and Apportionment*

State Col. A	Factors of Apportionment Fractions: Property Col. B	Receipts Col. C	Payroll Col. D	Others Col. E	Items Separately Allocated Col. F	Separate Accounting Allowed? Col. G(2)
ALA.(1,6)	Yes	Yes	Yes	(6-7)	(1-5)	Yes(2)
ALASKA(9)	Yes	Yes	Yes	(4)	(1-5)	Yes
ARK.(6,9)	Yes	Yes	Yes	(4,6)	(1-5)	Yes
COLO.(9)	Yes	Yes	No		(2-4,11,15,17)	Yes
DEL.	Yes	Yes	Yes	(7)	(2,3,5,15,16,20)	Yes
D.C.(6)	Yes	Yes	Yes	(4)	(1-5)	Yes
HAW.(6,9,15)	Yes	Yes	Yes	(6)	(1-5)	Yes
IDAHO(6,9)	Yes	Yes	Yes		(1-5)	Yes
ILL.(6)	Yes	Yes	Yes	(6)	(1-5)	Yes
IND.(2,6)	Yes	Yes	Yes		(1-5)	Yes
KAN.(6,9)	Yes	Yes	Yes	(6)	(1-5)	Yes
ME.(6,7,8)	Yes	Yes	Yes		(1-5)	Yes
MD.	Yes	Yes	Yes	(5)	(1-3)	Yes
MASS.	Yes	Yes(3)	Yes	(5)	(4)	Yes
MONT.(6,8,9)	Yes	Yes	Yes		(1-5)	Yes
NEB.(6,7,9)	Yes	Yes	Yes		(1-5)	Yes
N.H.	Yes	Yes	Yes	(7)		No
N.J.(15)	Yes	Yes	Yes	(9)		No
N.M.(6,9)	Yes	Yes	Yes	(6,12)	(1-5)	Yes
N.C.(6,8)	Yes	Yes	Yes	(4,6)	(1-5,9)	Yes
N.D.(6,9)	Yes	Yes	Yes	(16)	(1-5)	Yes
ORE.(6,8,9)	Yes	Yes	Yes	(4,6)	(1-5)	Yes
R.I.	Yes	Yes	Yes			(1)
TENN.(6)	Yes	Yes	Yes(5)	(4,6)	(1-5)	Yes
UTAH(6,8,9)	Yes	Yes	Yes		(1-5)	Yes
VT.	Yes	Yes	Yes	(7)	(2-3,24)	(1)
WIS.(4, 13)	Yes(1)	Yes(2)	Yes(3,4)	(2-4,6)	(2-5,15,20)	Yes

Appendix C-1

* The materials reproduced in Appendices C-1-C-4 are taken from Prentice-Hall, State and Local Taxes, All States Unit, ¶¶1046–1048-A. The tables include only those jurisdictions which include foreign source dividends in part or in whole in the tax base subject to apportionment.

Col. A. (1) Domestic corporations and residents can't allocate. (2) Gross income tax allows no allocation. (4) Disallows equally weighted 3-factor formula. (6) Uniform Div. of Income for Tax Purposes Act (UDITPA) is substantially adopted (see footnote (9) for states also adopting UDITPA under Multistate Tax Compact). (8) Only for corporations and nonresident individuals. (9) State has adopted Multistate Tax Compact (MTC), including 3-factor formula. Taxpayer may elect to allocate by 3-factor formula. (11) Disallows equally weighted 3-factor formula. (13) Resident individuals can't allocate. (15) Only nonresidents allocate-apportion for gross (personal) income tax, using methods set by Dir.'s Regs.

Col. B. (1) Factor represents 25% of formula.

Col. C. (2) Factor is 50% of formula. (3) Sales factor used twice.

Col. D. (3) Factor is 25% of formula. (4) Payroll factor replaces cost factor. (5) See footnote (6), Col. A.

Col. E. (2) Manufacturers' costs. (3) For businesses other than manufacture or sale of tangible personalty, Dir. may make rules. (4) Special provisions apply to some or all carriers. (5) Special provisions for construction cos. (6) Special provisions for specialized businesses (e.g., utility, financial and service businesses, etc.). (7) Such other factors as Admr. deems applicable. (9) Use assets allocation if producing greater percentage than average of Col. B, C and D. (12) Operating expenses. (16) Special provisions for financial business.

Col. F. (1) Capital gains; (2) Rents. (3) Royalties (in S.C. limited to tangibles). (4) Dividends (in Mass. not included in tax base; in Ohio, if not deducted or excluded for corporate net income). (5) Interest. (9) Income from sale of realty. (11) Interest from intangible personalty not used in business and not inventory. (15) Gain or loss from capital assets. (16) Gain or loss on realty sale. (17) Gain from sale of corporate stocks. (20) Gain or loss from intangibles. (24) Income from any trade, business, all instate. (26) Single Business tax allows deduction from base; dividends, interest, royalties and certain capital losses.

Gol. G. (1) No specific provision. (2) Separate accounting, if allowed, may require official approval.

APPENDIX C-2

Receipts Factor

STATE Col. A(1)	Office Where Negotiated Col. B	Property at Time of Order Col. C	Receipt or Acceptance of Order Col. D	Negotiating Personnel Col. E	Delivery Place Col. F	Shipment Origin Col. G	Other Col. H
ALA.					X	X(2, 3)	X(9)
ALASKA					X	X(2, 3)	X(3, 9)
ARK.						X(2, 3)	X(7)
COLO.	X(5)			X(2)	X(1)		
DEL.					X(1)	X(3)	
D.C.		X(2)			X		X(3, 9)
HAW.					X	X(2, 3)	X(3, 9)
IDAHO					X	X(2, 3)	X(3, 9)
ILL.					X	X(2, 3)	X(3, 9)
IND.					X	X(2, 3)	X(3, 9)
KAN.					X	X(2, 3)	X(3, 9)
ME.					X	X(2, 3)	X(3, 9)
MD.					X		X(3, 9)
MASS.	X(3)				X		X(3, 9, 14)
MONT.					X	X(2, 3)	X(3, 9)
NEB.					X	X(2, 3)	X(3, 9)
N.H.		X(2)		X(1, 2)	X(2, 4)	X(1)	X(3, 9)
N.J.		X			X(5)		X(4)
N.M.					X	X(2, 3)	X(3, 9)
N.C.					X		X(2, 6)
N.D.					X	X(2, 3)	X(3, 9)
ORE.					X	X(2, 3)	X(3, 9)
R.I.					X		X(2)
TENN.					X(2)	X(2)	X(3, 9)
UTAH	X(2, 5)				X(2)	X(2, 3)	X(3, 9)
VT.		X(1)	X(1)				X(4)
WIS.					X	X(2,3,7)	X(3, 12)

Appendix C-2

Col. A. (1) For member states of Multistate Tax Compact, see Br. App. C-1.

Col. B. (2) Sales through or by instate offices, agencies or branches and taxpayer not taxed in buyer's state. (3) Sales not negotiated or effected by agents or agencies chiefly at, connected with or sent out from business premises outstate. (4) Includes sales between outstate points if order secured or received by state office or salesman working from it. (5) Public or private warehouse treated like office.

Col. C. (1) Property instate on receipt or appropriation to order, or not at taxpayer's outstate business place when order received or accepted instate. (2) If taxpayer not taxed in destination state.

Col. D. (1) See Col. C.

Col. E. (1) Place where selling is performed. (2) Promotional acts given weight.

Col. F. (1) Deliveries in state, excluding deliveries for out-shipment. (2) Sales to customers instate. (4) See Col. H(10). (5) See Col. C.

Col. G. (1) Controlling factor when delivery is in same state. (2) If purchaser is U.S. government. (3) If taxpayer is not taxable in purchaser's state. (7) Only 50% of tangible personalty sales under "throwback" rule is in numerator (eff. starting 1979 tax year).

Col. H. (2) Receipts from instate sources. (3) For sale of intangibles, allocate instate if income-producing (earnings-producing, in Tenn.) activity is instate or Col. H(9) applies. (4) Receipts from instate serviees and rentals or royalties on property in or used in state. (6) Services instate (in N.C., if income-producing activities are instate). (7) If income-producing activity is instate for nontangibles; if multistate, Ark. share is same formula percentage used in allocating income of year. (9) For sales of intangibles, state with largest share of costs of performance. (10) Though sales of intangibles are included in 3-factor apportionment, there's no provision indicating which go in numerator. (11) If not taxed in purchaser's state. "Purchaser" includes U.S. (12) For intangibles and services allocate between states in ratio of local-to-total production costs. (14) Footnote (11) applies but deliveries in foreign countries and sales to US for resale to foreign govts. are treated as taxable in buyer's state.

APPENDIX C-3

Property Factor

STATE(22)	Col. A Owned Realty	Col. B Rented Realty	Col. C Owned Tangible Personalty	Col. D Rented Tangible Personalty	Col. E Goods in Transit	Col. F(7) Migratory Property
ALA.	X	(2, 5)	X	(2, 5)	X(23)	X(13)
ALASKA	X	X(2)	X	X(2)	X(23)	X(13)
ARK.	X	X(2)	X	X(2)	(1)	(1)
COLO.(4)	X	(1)	X	(1)	(1)	(1)
DEL.(4)	X	X(2)	X	X(2)	(1)	(1)
D.C.(4)	X	X(2)	X	X(2)	(1)	X(14)
HAW.(4)	X	X(2)	X	X(2)	(1)	X(13)
IDA.(4)	X	X(2)	X	X(2)	X(23)	X(13)
ILL.	X	X	X	X	(1)	X(13)
IND.(4)	X	X(2)	X	X(2)	X(23)	X(13, 14)
KAN.	X	X(2)	X	X(2)	(1)	X(1)
ME.(4)	X	X(2)	X	X(2)	X(23)	X(13)
MD.(4)	X	X(2)	X	X(2)	(1)	(1)
MASS.(25)	X	X(2)	X	X(2)	(1)	(1)
MONT.(4)	X	X(2)	X	X(2)	(1)	(1)
NEB.(4)	X	X(2)	X	X(2)	X(23)	X(13)
N.H.	X	X(2)	X	X(2)	(1)	(1)
N.J.	X	(6)	X	(6)	(10-12)	(1)
N.M.(4)	X	X(2)	X	X(2)	X(23)	X(13)
N.C.(4)	X	X(2, 26)	X	X(2)	X(23)	X(13)
N.D.(4)	X	X(2)	X	X(2)	X(23)	X(13)
ORE.(4)	X	X(2)	X	X(2)	X(23)	X(13)
R.I.	X	X(2)	X	X(2)	X(10-12)	X(14)
TENN.	X	X(2)	X	X(2)	(1)	(1)
UTAH(4)	X	X(2)	X	X(2)	X(23)	X(13)
VT.	X	X(2)	X	(6)	(10-12)	(1)
WIS.(4)	X	X(2)	X	X(2)	X(18)	X(13)

Appendix C-3

(1) No specific provision.

(2) 8 times net annual rent.

(4) If income specifically allocated, non-allocable or exempt, exclude property.

(5) Property used is included.

(6) Specifically excluded. N.J.—applies to corporation business (franchise) tax.

(7) Carrier rules for rolling stock listed in absence of general rules.

(10) Goods in transit between outstate points included in denominator only.

(11) Goods in transit between instate points included in numerator and denominator.

(12) Goods in transit between instate and outstate points excluded from numerator and denominator.

(13) In numerator on percentage of time spent basis.

(14) In numerator on percentage of mileage basis.

(18) Treated to be at destination.

(22) For member states of Multistate Tax Compact, see Br. App. C-1.

(23) In numerator (destination state) if regularly included in denominator.

(25) "Real and tangible personalty" include leases and their improvements whether in or outstate.

(26) Subrentals aren't deductible if "business income".

APPENDIX C-4

Payroll Factor

STATE Col. A (1)	Office Location Col. B	Time Spent in State(1) Col. C	Compensation Earned in State Col. D	Other Col. E
ALA.	X(7)		X(1, 8, 9)	
ALASKA	X(7)	X(2, 3)	X(1, 8, 9)	
ARK.	X(7)		X(1, 8, 9)	
COLO. (2)	X(7)		X(1, 8, 9)	
DEL.			X(2)	
D.C.	X(7)		X(1, 8, 9)	
HAW.	X(7)		X(1, 8, 9)	
IDAHO	X(7)		X(1, 8, 9)	
ILL.	X(7)		X(1, 8, 9)	
IND.	X(7)		X(1, 8, 9)	
KAN.	X(7)		X(1, 8, 9)	
ME.	X(7)		X(1, 8, 9)	
MD.	X(7)		X(1, 8, 9)	
MASS. (3)	X(7)		X(1, 8, 9)	
MONT.	X(7)		X(1, 8, 9)	
NEB.	X(7)		X(1, 8, 9)	
N.H.	X(7)		X(1, 9)	
N.J.	X(7)		X(1, 8, 9)	X(8)
N.M.	X(7)		X(1, 8, 9)	
N.C.	X(7)		X(1, 8, 9)	
N.D.	X(7)		X(1, 8, 9)	
ORE.	X(7)		X(8)	
R.I.				X(7)
TENN.	X(7)		X(1, 9)	
UTAH	X(7)		X(1, 8, 9)	
VT.	X(1, 8)	X(5)	X(10)	X(1)
WIS.	X(7)		X(1, 8, 9)	

Appendix C-4

Co. A. (1) For member states of Multistate Tax Compact, see Br. App. C-1. (2) As member state of Multistate Tax Compact, 3-factor formula (including payroll) may be elected. (3) Manufacturing and business primarily in research and development allocate in ratio of local-to-total payroll.

Col. B. (1) N.C., Vt.—If chief headquarters. (5) Haw.—If either employed in state or identified with office in state. (7) If part performance and controlling base instate, or residence instate. (8) Vt.—See Col. C, D, E, if inequitable.

Col. C. (1) Applies to those working in and out of state. (2) Alaska.—Seagoing personnel, use port days. (3) Alaska.—Transportation workers, use working days. (5) Vt.—If office factor inequitable, for employees paid on time basis.

Col. D. (1) If some of the service is performed instate and base of operations or control or individual's residence is instate. (2) Del.—If employee within state. (6) Haw.—If either employed in state or identified with office in state. (8) See Col. B footnote for state. (9) Also service entirely instate or having only incidentals outside. (10) Vt.—If office factor inequitable, see Col. E.

Col. E. (1) Vt.—If office factor inequitable: salesmen on commission, on basis of business volume; compensation based on results achieved, on value of instate services. (7) Connected with instate activities or transactions. (8) N.J.—Also if contributions not paid under unemployment compensation law of another state.

APPENDIX C-5

Methods of Valuing Property In Property Factors

State[1]	Original Cost	Book Net Value	Federal Tax Net Value
ALA.	X		
ALASKA	X		
ARK.	X		
COLO.	X (MTC)		X (traditional formula)
DEL.	X		
D.C.	X		
HAW.	X		
IDAHO	X		
ILL.	X		
IND.	X		
KAN.	X		
ME.	X		
MD.	X		
MASS.			X
MONT.	X		
NEB.	X		
N.H.	X		
N.J.		X	
N.M.	X		
N.C.	X		
N.D.	X		
ORE.	X		
R.I.		X	
TENN.	X		
UTAH	X		
VT.		X	
WIS.	X		

Appendix C-5

1. Ala. Reg. 31.2.11, CCH 15-247; Alaska Stat. §43.19.010, Art. IV.11, CCH 96-809b; Ark. Stat. Ann. §84-2065 (UDITPA), CCH 94-689, and Ark. Stat. Ann. §84-4101, Art. IV.11 (Multistate Tax Compact, "MTC"), CCH 94-994; Colo. Rev. Stat. §39-22-303(2)(b) (traditional provision), CCH 94-615, Return Sch. A, CCH 13-438, and Colo. Rev. Stat. §24-60-1301, Art. IV.11 (MTC), CCH 92-755; Del. Code Ann. Tit. 30, §1903(b)6(A), CCH 92-329; D.C. Reg. §309.5F(4), CCH 12-413; Haw. Rev. Stat. §235-31 (UDITPA), CCH 92-441, and Haw. Rev. Stat. §255-1, Art. IV.11 (MTC), CCH 94-115; Idaho Code §63-3027(k) (UDITPA), CCH 94-155b, and Idaho Code §63-3701, Art. IV.11 (MTC), CCH 94-984; Ill. Rev. Stat. §304(1)(B), CCH 90-918; Ind. Code 6-3-2-2, §2(c), CCH 95-138; Kan. Stat. §79-3281 (UDITPA), CCH 94-075, and Kan. Stat. §79-4301, Art. IV.11 (MTC), CCH 95-225; Me. Rev. Stat. Tit. 36, §5211.10, CCH 95-110; Md. Reg. 03.04.01.03E(3), CCH 12-426; Mass. Gen. Laws Ann. Ch. 63, §38(d), CCH 91-293; Mont. Rev. Codes Ann. §15-31-307(1) (UDITPA), CCH 95-365, and Mont. Rev. Codes Ann. §15-1-601, Art. IV.11 (MTC), CCH 92-151; Neb. Rev. Stat. §77-2745 (UDITPA), CCH 92-818, and Neb. Rev. Stat. §77-2901, Art. IV.11 (MTC), CCH 92-995d; N.H. Rev. Stat. Ann. §77-A:3.I, CCH 91-618, Return Sch. A, CCH 16-420; N.J. Rev. Stat. §54:10A-6(A), CCH 94-054, Return Sch. J. CCH 6-410; N.M. Stat. Ann. §72-15A-27 (UDITPA), CCH 95-648, and N.M. Stat. Ann. §72-15A-37, Art. IV.11 (MTC), CCH 95-672; N.C. Gen. Stat. §105-130.4(j)(2), CCH 92-070a; N.D. Cent. Code §57-38.1-11 (UDITPA), CCH 95-075, and N.D. Cent. Code §57-59-01, Art. IV.11 (MTC), CCH 96-625; Or. Rev. Stat. §314.655(2) (UDITPA), CCH 94-143a, and Or. Rev. Stat. §305.655, Art. IV.11 (MTC), CCH 92-007; R.I. Gen. Laws §44-11-14(1), CCH 93-279; Tenn. Code Ann. §67-2716, CCH 95-533; Utah Code Ann. §59-13-88 (UDITPA), CCH 92-747, and Utah Code Ann. §59-22-1, Art. IV.11 (MTC), CCH 93-303n; Vt. Stat. Ann. Tit. 32, §5833(a)(1), CCH 93-109, Corp. Apportionment Sch., CCH 13-385; Wis. Stat. §71-07(2)(a)3, CCH 91-547.

Supreme Court, U. S.
FILED
AUG 20 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—VS.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

APPELLEE'S BRIEF

RICHARD JOHNSTON KING
The Valley Professional Center
Waitsfield, VT 05673
Tel: (802) 496-4371

GREGORY A. MCKENZIE
Deputy Attorney General
Pavilion Office Building
Montpelier, VT 05602
Tel: (802) 828-3171
Attorneys for the Appellee

August 20, 1979

Index

PAGE

Statement of the Case 1

I. The Vermont Law 1

II. The Vermont Tax Returns Filed by Mobil 4

III. The Facts 6

IV. Proceedings Below 6

Statement of the Issue 9

Summary of the Arguments Presented 9

ARGUMENT

I. Mobil has Failed to Present a Factual Record Sufficient to Sustain its Burden of Proof 10

II. Vermont's Apportioned Net Income Tax Satisfies the Requirements of the Due Process Clause because Vermont has Nexus with Mobil and Mobil has failed to Show that its Income Taxed is Grossly Disproportionate to its Business Activities in the State 11

III. Vermont's Apportioned Net Income Tax Satisfies the Requirements of the Commerce Clause because Mobil Is neither Subjected to a Substantial Risk nor the Actuality of Multiple Taxation 20

IV. This Court's Decision in *Japan Line, Ltd.*, Is Not Precedent for Its Decision on Mobil's Claims 24

Conclusion 26

Appendix I 27

TABLE OF AUTHORITIES

Cases: PAGE

ASARCO v. *Idaho*, No. 78-1839, Motion to Dismiss or Affirm Pending 3

Bass, Ratcliff & Gretton v. *Tax Commission*, 266 U.S. 271 (1924) 14, 15

Butler Brothers v. *McColgan*, 315 U.S. 501 (1942) 10, 14, 15

California v. *Texas*, 437 U.S. 601 (1978) 24

Department of Revenue of Washington v. *Association of Washington Stevedoring Companies, et al.*, 435 U.S. 734 (1978) 26

F.W. Woolworth Co. v. *Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972) 7

Japan Line, Ltd. v. *County of Los Angeles*, 47 U.S.L.W. 4477 (April 30, 1979) 10, 24, 25

Mobil Oil Corp. v. *Commissioner of Taxes*, 136 Vt. 545, 394 A.2d 1147 (1978) 8

Moorman Manufacturing Co. v. *Bair*, 437 U.S. 267 (1978) 11, 12, 13, 15, 20, 21, 22, 24

Northwestern States Portland Cement Co. v. *Minnesota*, 358 U.S. 450 (1959) 12, 22

Standard Pressed Steel Co. v. *Department of Revenue of Washington*, 419 U.S. 560 (1975) 22, 23

Underwood Typewriter Co. v. *Chamberlain*, 254 U.S. 113 (1920) 11, 15

Statutes:

32 V.S.A. §5811(15) 1

32 V.S.A. §5811(18) 2

32 V.S.A. §5820(a) 2

32 V.S.A. §5833 ..... 1, 2, 3, 6

Other Authorities:

UDITPA § 1(a), 1(e), 4 and 7, Regulations § IV.1.(c)(4) 3

Hearings before the Subcommittee on State Taxation of Interstate Commerce of the Committee on Finance, United States Senate, 93d Congress, 1st Session (1973) 13

Hearing of the Subcommittee on Anti-Trust and Monopoly of the Committee on the Judiciary of the United States Senate on January 21, 1976 17

State Taxation of Interstate Businesses and the Multistate Tax Compact: The Search for a Delicate Uniformity, Columbia Journal of Law and Social Problems (1975) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—VS.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

APPELLEE'S BRIEF

Statement of the Case

I. *The Vermont Law*

Vermont imposes an annual net income tax on every taxable corporation.[1] Vermont net income is defined as taxable income

[1] 32 V.S.A. §5811(15) defines a taxable corporation as ". . . for any taxable year, a corporation which, at any time during that taxable year:

(A) Was incorporated under the laws of this state;

(B) Possessed a certificate of authority to do business within this state; or

(C) Received any income allocable or apportionable to this state under the provisions of section 5833 of this title."

During the years in question, Mobil possessed a certificate of authority to do business in Vermont. In addition, Mobil received income, owned property, paid wages and made sales within Vermont and, accordingly, received income allocable to Vermont under §5833.

under the laws of the United States.[2] If income is derived from business activities both within and without Vermont, then the 6-percent Vermont tax is imposed only on net income apportioned to fairly and equitably represent the extent of business activities in the State. Under Vermont's apportionment formula, a multistate corporation's net income apportioned to Vermont is based on the arithmetic average of the percentages of its total payroll, property and sales attributable to its business activities in Vermont.[3]

---

[2] 32 V.S.A. §5811(18) defines Vermont net income as ". . . for any taxable year and for any corporate taxpayer, the taxable income of the taxpayer for that taxable year under the laws of the United States, excluding income which under the laws of the United States is exempt from taxation by the states." It should be noted that the description "Vermont net income" is misleading in that it defines net income, before apportionment to represent business activities in Vermont. By incorporating, without modification, taxable income under the laws of the United States as Vermont net income, before apportionment, Vermont excludes all federal, state and foreign taxes claimed as deductions for federal income tax purposes.

Taxable income under the laws of the United States is incorporated by reference:

". . . to conform the Vermont . . . corporate income taxes with the United States Internal Revenue Code, except as otherwise expressly provided, in order to simplify the taxpayer's filing of returns, reduce the taxpayer's accounting burdens, and facilitate the collection and administration of these taxes." (32 V.S.A. §5820(a)).

[3] 32 V.S.A. §5833(a) provides, in part:

". . . If the income of a taxable corporation is derived from any trade, business or activity conducted both within and without this state, the amount of the corporation's Vermont net income which shall be apportioned to this state, so as to allocate to this state a fair and equitable portion of that income, shall be determined by multiplying that Vermont net income by the arithmetic average of the following factors:

(1) The average of the value of all the real and tangible property within this state (A) at the beginning of the taxable year and

(*Footnote continued*)

If it is established that the formula does not apportion to Vermont that share of a taxable corporation's net income which fairly represents the extent of its business activities in Vermont, then the Commissioner of Taxes (the "Commissioner") is directed to make such modifications as are necessary to achieve such fair apportionment.[4] Accordingly, both the application of the appor-

---

(B) at the end of the taxable year, expressed as a percentage of all such property both within and without this state;

(2) The total wages, salaries, and other personal service compensation paid during the taxable year to employees within this state, expressed as a percentage of all such compensation paid whether within or without this state;

(3) The gross sales, or charges for services performed, within this state, expressed as a percentage of such sales or charges whether within or without this state."

[4] 32 V.S.A. §5833(b) provides, in part:

". . . If the application of the provisions of this section does not fairly represent the extent of the business activities of a corporation within this state, the corporation may petition for, or the commissioner may require, with respect to all or any part of the corporation's business activity, if reasonable:

(1) Separate accounting;

(2) The exclusion or modification of either [*sic*] or both [*sic*] of the factors;

(3) The inclusion of one or more additional factors which will fairly represent the corporation's business activity in this state; or

(4) The employment of any other method to effectuate an equitable allocation and apportionment of the corporation's income."

While the Vermont definition of net income makes no distinction between business and nonbusiness income, in the proper case, that distinction could be made by the Commissioner under his power to modify the apportionment to insure that it fairly represents the extent of business activities in Vermont. (Cf. UDITPA § 1(a), 1(e), 4 and 7, Regulations § IV.1.(c).(4). See also ASARCO v. Idaho, No. 78-1839)

tionment formula and the Commissioner's power to modify that formula assure that the Vermont tax is applied only to that share of a taxable corporation's net income which fairly represents the extent of its business activities in Vermont.

II. *The Vermont Tax Returns Filed by Mobil*

In 1970, 1971 and 1972, Mobil Oil Corporation ("Mobil") produced, transported, refined, distributed and sold petroleum and petroleum products, including chemicals, and held stocks in related operating subsidiaries and affiliates. Mobil's income for those years included income from Mobil's activities in Vermont and elsewhere and included dividends from operating subsidiaries and affiliates. For each of those years, Mobil filed a Vermont corporate income tax return on which it reported its federal taxable income and its Vermont and worldwide payroll, property and sales factors.[5] Rather than report its federal taxable income as its Vermont net income, as required by the Vermont Statutes, Mobil calculated its net income, before apportionment, by subtracting from federal taxable income, all income received as dividends.[6] By thus reducing federal taxable income and, consequently, net income before apportionment, Mobil was able to report no taxable income to Vermont for two of the three years in question.

---

[5] Mobil's Vermont tax returns are reproduced in the single Appendix filed by the parties (hereinafter referred to as "App."), at pages A33, A47 and A61, respectively. A synopsis of the information contained in those returns, in table form, is annexed to this Brief as Appendix I.

[6] In addition, Mobil deducted interest and foreign taxes, claims which it has abandoned on this appeal. The calculations as reported by Mobil were as follows:

(*Footnote continued*)

The Vermont Department of Taxes recalculated Mobil's tax liability in accord with the Vermont Statutes using federal taxable income as Vermont net income, before apportionment, and determining apportioned net income and the Vermont tax accordingly. The Department of Taxes assessed Mobil for the resulting tax deficiency.

For the years in question, Mobil reported gross income of $2,107,519,818.23, $2,306,420,151.25 and $2,444,866,994.00, and total deductions of $1,786,558,689.94, $1,893,136,692.06 and $2,065,517,997.33, respectively. (Forms 1120, lines 11 and 27, App., at pages A38, A39, A52, A53, A66 and A67, respectively). By reducing Vermont net income, before apportionment by "non-apportionable" dividend income, Mobil subtracted from "apportionable" income, all deductions. In other words, Mobil deducted from the income of its integrated petroleum business, after it excluded dividend income, the costs and expenses attributable to its stockholdings. As a result of the exclusion of so-called "non-apportionable" income, and the allocation of all deductible costs and expenses to remaining gross income, Mobil created and reported for Vermont tax purposes, net operating losses for two of the three years at issue.

Year	*1970*	*1971*	*1972*
U.S. Taxable Income	$220,035,244	$308,253,570	$232,825,728
Non-Apportionable Income			
Dividends	174,211,073	282,817,008	280,623,403
Interest	10,520,792	12,609,826	3,905,208
Foreign Taxes	12,221,476	34,659,576	38,260,249
Subtotal	196,953,342	330,086,410	322,788,861
Vermont Net Income, Before Apportionment	$ 23,081,901	($21,832,840)	($89,963,133)

(App., at pages A37, A51 and A65, respectively).

III. *The Facts*

During the course of the Vermont tax proceedings Mobil submitted a "stipulation" to the Commissioner, who rejected it as ". . . the facts that support your arguments alone." (Transcript of Commissioner's Hearing of November 8, 1973, App., at page A13). It is this selective and artfully-phrased statement which Mobil submits to this Court as a "Stipulation."[7] In view of the carte blanche Mobil had to present those facts which supported its arguments, it is curious that the Record is so sparse. Mobil alleged only two relevant facts in its Statement: first, that Mobil was engaged in the petroleum business in the United States, including exploration, production, refining, transportation, distribution and sale of petroleum and petroleum products; and second, that Mobil markets petroleum products and related products in Vermont. The Statement also asserts that Mobil's management and custody of the stocks of its operating subsidiaries and affiliates took place outside Vermont, but, as will be shown, this assertion is not relevant to the issues here presented. (Statement, paragraphs (6), (9) and (11), App., at pages A81, A82 and A83, respectively).

IV. *Proceedings Below*

Mobil appealed the assessed tax deficiencies to the Commissioner and presented, in support of its appeal, a variety of arguments raising issues of statutory interpretation and constitutional limitations. In addition, Mobil petitioned the Commissioner to modify the apportionment of its net income to Vermont pursuant to his authority under 32 V.S.A. § 5833(b). The modifications Mobil sought were the exclusion of its income received as dividends from net income, before apportionment, or modification

[7] Mobil's proposed stipulation is hereinafter referred to as Mobil's "Statement."

of the apportionment factors to achieve the same Vermont tax result.[8]

The Commissioner rejected Mobil's statutory interpretation and claims of constitutional limitations and denied Mobil's petition for modification.[9] In support of his determination, the Commissioner quoted, with approval, from an opinion of the Vermont Supreme Court, that:

> " '. . . the realistic value of the exercise of a franchise in a particular state is enhanced and contributed to by the worth or income of the entire enterprise.' . . . Typically, this approach is followed where there is a unity of use and management of the enterprise being taxed." (*F.W. Woolworth Co. v. Commissioner of Taxes*, 130 Vt. 544, 549, 298 A.2d 839 [1972]).

Mobil timely and properly appealed the Commissioner's determination to the Washington Superior Court, which sustained the Commissioner's determination on all issues except the constitutional limitations of the Commerce Clause. On that issue the Superior Court held that:

> "However, because the commercial domicile of plaintiff does have the authority to tax investment dividends and interest without apportionment; because the capacity to tax, and

[8] The legal argument presented in support of Mobil's petition for modification appears in the Transcript of Commissioner's Hearing of November 8, 1973. (App., at pages A11, A25 and A26.)

[9] The Commissioner, in his determination, specifically rejected both alternatives requested in Mobil's petition for modification. (Page 4a of the Appellant's Jurisdictional Statement (hereinafter referred to as "JS. App."), paragraphs A. and B., and page 12a and 13a, paragraphs 1 and 2). The Commissioner did grant Mobil's petition to modify in another respect—gross up of dividends—which is not an issue before this Court. (JS. App., page 13a, paragraph 5).

not the actual imposition of same, is the test, such income could be the subject of prohibitive multiple taxation by inclusion in the Vermont apportionment base." (Unreported opinion, J.S. App., at page 16a).

The Commissioner of Taxes timely and properly appealed the decision of the Washington Superior Court to the Vermont Supreme Court. That Court considered the single question:

". . . Does Vermont's application of its apportioned net income tax to the investment income in issue constitute multiple taxation prohibited by the Commerce Clause?" (*Mobil Oil Corp. v. Commissioner of Taxes*, 136 Vt. 545, 548, 394 A.2d 1147 [1978] (JS. App., at page 22a)).

The Vermont Supreme Court held:

"The burden is upon the taxpayer to demonstrate a risk of multiple taxation. (Citations omitted.)

Mobil in the case at bar has not established that its commercial domicile can tax the investment income of its domiciliary corporation without apportionment." (*Id.* at page 548 and page 23a, respectively).

As to whether the risk, as opposed to actual multiple taxation, is the proper constitutional test, the Court said:

"We do not decide this issue in the case at bar since Mobil has failed to establish on the record that New York has the power to tax investment income without apportionment, and hence no risk of multiple taxation is here shown." (*Id.* at page 549 and page 24a, respectively).

While the issue presented in this appeal is a narrow one, the Court's decision on Mobil's claims has potentially far-reaching consequences. In recognition of this fact, Vermont has consented to the filing of briefs by Standard Oil Company of California,

the State of Illinois, and the Multistate Tax Commission, as *amici curiae*, in support of the Appellee.

Statement of the Issue

Does the Constitution permit a state to impose a tax on the net income of a corporation, which regularly and continuously engages in substantial business activities in that state, fairly apportioned to reflect the extent of such business activities where:

1. The corporation receives virtually all of its net income in the form of dividends from operating subsidiaries and affiliates; and

2. The corporation neither alleges nor proves that its operating subsidiaries and affiliates do not comprise integral parts of its worldwide, integrated business, a part of which is conducted in the taxing state?

Summary of the Arguments Presented

I. Mobil has not met its required burden of proving by clear and cogent evidence that the Vermont tax was imposed on extraterritorial values or created a prohibited tax burden on interstate or foreign commerce.

II. In the context of a tax on apportioned net income, the geographical location of income-producing property or activities is not relevant to the determination of tax base, before apportionment. Whether a tax is valid depends on whether the formula apportions to the taxing state that share of a taxpayer's net income fairly attributable to business activities in that state. Mobil has not proved that Vermont's apportionment formula, as applied to its net income, including income received as dividends, does not allocate to Vermont that por-

tion of its net income fairly attributable to its business activities in Vermont.

Mobil's nexus with Vermont was substantial, and the Vermont tax assessed bears a fair relationship to the value of the protections, opportunities and benefits provided by Vermont. Accordingly, the Vermont tax on apportioned net income satisfies the requirements of the Due Process and Commerce Clauses.

III. Mobil has failed to show either the existence of a risk or the fact of constitutionally prohibited multiple taxation.

Mobil's claim that New York, the state of its commercial domicile, has the constitutional power to tax, without apportionment, all income received as dividends, is not supported by the decisions of this Court or the economic realities of interstate commerce.

IV. Mobil's claim that this Court's decision in *Japan Line, Ltd. v. County of Los Angeles* (47 U.S.L.W. 4477 [April 30, 1979]) is relevant to the issue here presented represents an unwarranted extension and interpretation of that decision.

Argument

I. *Mobil has Failed to Present a Factual Record Sufficient to Sustain its Burden of Proof.*

This Court has clearly stated and consistently required that:

"One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed. *See Norfolk & Western Ry. Co. v. North Carolina,* 297 U.S. 682, 688." (*Butler Brothers v. McColgan,* 315 U.S. 501, 507, [1942].

See also Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 [1920]).

In *Moorman Manufacturing Co. v. Bair* (437 U.S. 267, 274 [1978], this Court confirmed:

". . . that the States have wide latitude in the selection of apportionment formulas and that a formula-produced assessment will only be disturbed when the taxpayer has proved by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportion to the business transacted . . . in that State,' (citation omitted), or has 'led to a grossly distorted result.' (citation omitted)."

Mobil asks this Court to void the Vermont tax on apportioned net income but has failed to present a factual record on which such relief can be granted. Mobil has neither claimed nor proved that its net income apportioned to Vermont was out of proportion to its business activities in Vermont. Having failed to prove the amount of its net income attributable to business activities in Vermont for the years in question, Mobil's claim of extraterritorial taxation is without foundation and foreclosed by prior decisions of this Court. Having failed to prove either actual multiple taxation or a substantial risk of multiple taxation, Mobil's claim that the tax in question results in multiple burdens prohibited by the Commerce Clause is purely speculative. Therefore, it is respectfully suggested, that the Record presented does not support Mobil's claim for relief from this Court.

II. *Vermont's Apportioned Net Income Tax Satisfies the Requirements of the Due Process Clause because Vermont has Nexus with Mobil and Mobil has failed to Show that its*

Income Taxed is Grossly Disproportionate to its Business Activities in the State.[10]

Properly apportioned state taxes on the income of multistate corporations have been upheld by this Court in spite of the fact that they may, in some way, burden interstate commerce. As this Court said in *Northwestern States Portland Cement Co. v. Minnesota* (358 U.S. 450, 461, 462 [1959]):

> ". . . it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State."

The constitutional validity of a state tax on apportioned net income is determined by whether the formula apportions to the taxing state that share of a taxpayer's net income fairly attributable to business activities in that state. The rationale for this constitutional limitation is that:

> "Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice." (*Id.*, at page 462).

A tax on net income is a tax on a stated amount of dollars which are indistinguishable as to the location of the income-producing property or activity. The appropriate share of a business' net income which may properly be taxed by a particular state is determined by apportionment. As stated by this Court in *Moorman* (*supra*, at page 273), a tax on apportioned net income:

---

[10] Because Mobil failed to properly raise, brief or argue before the Vermont Supreme Court any claim under the Due Process Clause, the Commissioner contends that Mobil has not properly raised before this Court any issue under that Clause. (See Motion to Dismiss or Affirm, at pages 7 through 12).

> ". . . does not purport to identify the precise geographical source of a corporation's profits; rather, it is employed as a rough approximation of a corporation's income that is reasonably related to the activities conducted within the taxing State."

Mobil's counsel, an adjunct professor-of-law at New York University and an authority on the subject of state taxation, described the development of the concept of apportionment in the following terms:

> "It is important to realize that apportionment by formula grew out of necessity; it grew out of the fact that no one has ever been able to develop any kind of satisfactory method of accounting for measuring the legitimate claims of the various States to tax the income which is reflected in a series of interdependent basic operating transactions of an enterprise, such as manufacturing, producing, mining, or timbering in one State and selling in another, or buying in one State and selling in another." (Statement of Professor Hellerstein at Hearings before the Subcommittee on State Taxation of Interstate Commerce of the Committee on Finance, United States Senate, 93d Congress, 1st Session, 151 [1973]).

Mobil argues, at page 9 of its Brief, that because it managed and held the stocks of its operating subsidiaries and affiliates outside the state, Vermont lacked the nexus required by the Due Process Clause to tax the dividends produced by those stocks and that, therefore, Vermont must exclude from its net income, before apportionment, all income received as dividends.

In arguing that the property or activities which produce component items of income, before apportionment, must be physically located in the taxing state, Mobil ignores the underlying rationale recognized by this Court that apportionment is an alternative to separate accounting by geographical location. Because Mobil re-

ceived virtually all of its net income in the form of dividends, the effect of Mobil's argument is to reduce to a nominal amount (zero in two of the three years in question) Vermont's tax base, before apportionment.

Conceptually, Mobil's argument is analogous to the taxpayers' arguments in *Bass, Ratcliff & Gretton v. Tax Commission* (266 U.S. 271 [1924]) and *Butler Brothers v. McColgan* (*supra*). In those cases, the taxpayers argued that, by their methods of separate accounting, their business operations in the taxing states produced net losses. In this case, Mobil, although never asserting that its business activities in Vermont were not profitable if isolated by separate accounting, attributes to Vermont net losses resulting from unspecified business activities in unspecified locations by its own method of separate accounting (excluding only income received as dividends from tax base). For those same years Mobil reported substantial federal taxable income without identifying the sources of its profits.[11] In *Butler Brothers v. McColgan*, this Court responded to the taxpayer's attempt to avoid California's income tax by attributing no net income to California, saying:

> "A particular accounting system, though useful or necessary as a business aide, may not fit the different requirements when a state seeks to tax values created by business within its borders. (Citations omitted.) That may be due to the fact, as

[11] Actually, the net losses are artificially produced by Mobil's system of accounting. For example, in 1972, 121% of Mobil's taxable income was received in the form of dividends paid by companies whose value represented 48% of Mobil's net worth. From those figures it would appear that Mobil's so-called operating business, representing 52% of its net worth, operated at a substantial loss. Clearly, this method of accounting, while perhaps useful for some purposes, lacks reality. (Statement, paragraphs (13) and (16), App., at pages A83 and A84).

> stated by Mr. Justice Brandeis in *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 121, 41 S. Ct. 45, that a state in attempting to place upon a business extending into several states 'its fair share of the burden of taxation' is 'faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders.' . . . the fact of the matter is that appellant has not shown the precise sources of its net income of $1,149,677. If factors which are responsible for that net income are present in other States but are not present in California, they have not been revealed. At least in absence of that proof, California was justified in assuming that the San Francisco branch contributed its aliquot share to the advantages of centralized management of this unitary enterprise and to the net income earned. . . . and no showing has been made that income unconnected with the unitary business has been used in the formula."

(*See also Bass, Ratcliff & Gretton v. Tax Commission, supra; Underwood Typewriter Co. v. Chamberlain, supra*).

In *Moorman* (*supra*), the taxpayer argued that the Iowa tax on apportioned net income was imposed on extraterritorial values. The Court observed, at page 272:

> "This argument rests on two premises: first, that appellant's Illinois operations were responsible for some of the profits generated by sales in Iowa; and, *second, that a formula that reaches any income not in fact earned within the borders of the taxing State violates due process. The first premise is speculative and the second is foreclosed by prior decisions of this Court.*" (Emphases added.)

It is respectfully suggested that Mobil's Due Process claim is foreclosed by *Moorman* and prior decisions of this Court.

Mobil's argument that the income it received as dividends cannot be included in Vermont net income, before apportionment, appears to be based on the unsupported premise that its stockholdings were somehow separate from and unrelated to its worldwide, integrated petroleum business conducted, in part, in Vermont. Mobil would have this Court believe that because it holds stocks of its operating subsidiaries and affiliates outside Vermont, it is therefore a disinterested investor whose stockholdings are a separate business unrelated to its worldwide, integrated petroleum business. Even if Mobil's argument was sound that income source is relevant to the base of an apportioned net income tax, the premise upon which it makes that argument is not. Mobil has neither claimed nor proved that its operating subsidiaries and affiliates and income received as dividends were unrelated to its worldwide, integrated petroleum business. Mobil alleges only that the business activities of its operating subsidiaries and affiliates do not take place in Vermont, without revealing the nature of such activities, where they do take place, or their relationship to other components of Mobil's integrated petroleum business.

Reasonable inferences from the Record make it apparent that the dividends at issue, in fact, were derived from stockholdings in operating businesses integrally related to Mobil's petroleum business. For example, Mobil's stockholdings in ARAMCO, Mobil Marine Transportation Limited, Mobil Oil Iran with Limited Liability and Pegasus Overseas Limited could hardly be considered disinterested investments unrelated to Mobil's need to secure adequate supplies of crude oil, transportation and refining capacity and markets. The Record establishes that dividends from these four corporations, three of which are wholly-owned subsidiaries, equal approximately 90% of the income here at issue. (App., at pages A75 and A76).[12] The fact that Mobil has chosen to conduct certain of its integrated business activities through subsidiaries and affiliates, rather than through operating divisions, should not limit Vermont's right to impose a tax on Mobil's net income fairly apportioned to business activities in Vermont.[13]

With regard to the relationship between Mobil's income received as dividends and its financial operations, Mobil has not revealed how that income was used. Mobil has not disassociated such income from use to finance daily operations in Vermont, to purchase Vermont property, to pay Vermont wages, to purchase or finance the petroleum products marketed in Vermont or to otherwise, directly or indirectly, benefit its business activities in Vermont. Nor has Mobil revealed the source of the

---

[12] In addition to claiming lack of nexus between Vermont and its stockholdings, Mobil urges this Court to attribute significance to its claim that there was no nexus between Vermont and the underlying business activities and earnings of its operating subsidiaries and affiliates. By this argument, Mobil erroneously equates the income-producing activities of its operating subsidiaries and affiliates with the income received by it as dividends paid on their stocks.

[13] The integral nature of Mobil's operating subsidiaries and affiliates to its integrated worldwide petroleum business is apparent from the testimony of William P. Tavoulareas, President, Mobil Oil Corporation, before the Subcommittee on Anti-Trust and Monopoly of the Committee on the Judiciary of the United States Senate on January 21, 1976:

> ". . . It is a fact that . . . . this [development of prosperity and power] was made possible by an international oil industry which produced, refined, and marketed the oil, using a tremendously complex logistics system which got the right crude oil or product to the right customer at the right time.
>
> . . .
>
> Let me talk briefly now about the function of size in our international operations—again as this relates to the U.S. consumer. Look back at the 1973–1974 embargo period. When the Arab nations cut

(Footnote continued)

funds with which it purchased the stocks in its operating subsidiaries and affiliates.[14]

Furthermore, to the extent that Mobil borrows operating funds and seeks funds in the debt and equity capital markets, Mobil presents itself to commercial lenders and bond and stock market investors as a fully integrated, worldwide petroleum company. Finally, the Record makes no mention of where and by whom the products marketed in Vermont were produced, refined or transported.

In addition to proposing an inappropriate constitutional test and failing to provide a factual record which supports its claim of extraterritorial taxation by clear and cogent evidence as required, Mobil has failed to account appropriately for its gross income, costs and deductions. Mobil has not identified on the Record, by the location of the income-producing property or activity, either gross receipts or deductible costs and expenses. Therefore, it is not possible, on the facts presented, to compute net income for property or activities located in a particular state. While Mobil has separately accounted for its income received as dividends, it has not separately accounted for the costs and expenses attributable to its stockholdings. Those costs and expenses were deducted as ordinary and necessary business expenses in computing Mobil's federal taxable income and, accordingly, Vermont net income before apportionment. Those costs and expenses, to the extent they included property and payroll, were included in the denominator of those factors in the Vermont apportionment formula.

---

off oil supplies to the United States, the large oil companies utilized their worldwide logistics capability to move more non-Arab oil into the United States and move Arab oil to countries which were not embargoed."

[14] From the information Mobil has provided, the source of such funds could have been the profits earned by Mobil's Vermont business activities.

The implications of the constitutional test proposed by Mobil are enormous. That test, if accepted and applied consistently to other component items of income, would exclude from a state's tax base, Mobil's gross receipts from exploration, production, refining, transportation and marketing activities which take place outside that state. While the gross receipts from those activities would be excluded from tax base, before apportionment, the costs and expenses incurred in those activities would, nonetheless, under Mobil's theory, be deducted in computing federal taxable income and, consequently, from tax base, before apportionment.

Mobil's business activities in Vermont during the three years in question resulted in total Vermont sales of $27,319,578 and a total Vermont payroll of $736,068. During this period, Mobil's total property increased from $3,930,100 to $8,236,792. Clearly, these activities establish both a substantial nexus between Mobil and Vermont, and a substantial demand by Mobil for protections, opportunities and benefits provided by Vermont. Nonetheless, by the simple expedient of excluding income received as dividends from Vermont net income, before apportionment, Mobil artificially created, for Vermont tax purposes, substantial net losses without any demonstration of the actual profitability of its business activities in Vermont.

Instead of a total tax base for 1970, 1971, and 1972 of $1,273,646, Mobil reported a negative tax base of $173,648. The tax base reported by Mobil for each of the years in question would result in total tax payments of only $1,178 for Vermont's privileges, protections and opportunities instead of taxes totalling $76,417, computed on an average of .0016727 of Mobil's federal taxable income. If Mobil's Vermont sales had a 4.7% profit margin, Mobil's actual profits in Vermont would have exceeded the net income apportioned to Vermont by the formula. By con-

trast, Mobil's proposed method of accounting would result in those sales producing a substantial net loss. It is hardly credible that the increase in Mobil's business in Vermont during the period in question, both absolutely and as a percentage of its worldwide business, would have occurred unless Mobil's Vermont operations were, in fact, very profitable.

Clearly, an apportioned net income tax if restricted to a tax base limited to income derived from sources within the taxing state, would bear no fair relationship to the protections, opportunities and benefits provided by the taxing state or to the profits generated from business conducted in that state. Surely a state which provided the opportunities of a market which produced more than $27 million in Vermont sales for Mobil; which provided protections for Mobil's property which totalled, in 1972, $8.2 million; and which provided services which supported Mobil's payroll of more than $736,000, has a legitimate claim to fair compensation.

III. *Vermont's Apportioned Net Income Tax Satisfies the Requirements of the Commerce Clause because Mobil Is neither Subjected to a Substantial Risk nor the Actuality of Multiple Taxation.*

Mobil argues that Vermont's tax on apportioned net income contravenes the Commerce Clause because it creates an impermissible risk of multiple taxation of its interstate and foreign commerce. The risk asserted is the possibility that more than 100% of Mobil's income received as dividends will be taxed by various states as a result of diverse apportionment formulas or, alternatively, that New York, as the state of Mobil's commercial domicile, has the constiutional authority to tax such income without apportionment. However described, the issue raised is one of fair apportionment, and Mobil's claim is foreclosed by this Court's decision in *Moorman* (*supra*).

In *Moorman*, the taxpayer contended that the Iowa single-factor formula apportioned to Iowa income which was also taxed by Illinois. Therefore, the taxpayer argued, the Iowa tax created an impermissible multiple burden in violation of the Commerce Clause. The Court first analyzed the facts presented, finding that:

> "this record does not establish the essential factual predicate for a claim of duplicative taxation. Appellant's net income during the years in question was approximately $9 million. Since appellant did not prove the portion derived from sales to Iowa customers, rather than sales to customers in other States, we do not know whether Illinois and Iowa together imposed a tax on more than 100% of the relevant net income." (*Id.*, at page 276).

The Court required a showing of *actual multiple taxation*, and finding the taxpayer's evidence deficient, held that the existence of multiple burdens was speculative.

Mobil does not claim actual multiple taxation and the Record contains no real evidence of any substantial risk of multiple taxation. New York does not tax dividends from Mobil's subsidiaries, which represent the vast majority of the dividends here at issue, and taxes only a very small portion of the dividends from non-subsidiaries. (JS. App., page 39a). Since Mobil cannot even assert, much less prove, actual double taxation in this case, under *Moorman*, this ends the inquiry and the existence of an impermissible burden is speculative.[15]

---

[15]As to the substantiality of the risk Mobil faces, the economic realities of taxation by states of commercial domicile are the subject of an excellent analysis which concludes:

> "Major domiciliary states have found that ultimately it is more profitable to lure interstate businesses to settle in the state than to tax their dividend income. As an incentive for corporations to locate within them, these states deliberately treat such income specially."

(*Footnote continued*)

The *Moorman* decision was not the first time the Court required an essential "factual predicate" for a claim of duplicative taxation. In *Northwestern States* (*supra*), the Court said, at page 462:

> "One of the 'realities' raised by the parties is the possibility of a multiple burden resulting from the exaction in question. The answer is that none is shown to exist here. . . . there is nothing to show that multiple taxation is present. We cannot deal in abstractions."

In *Standard Pressed Steel Co. v. Department of Revenue of Washington* (419 U.S. 560 [1975]), this Court considered a challenge to the Washington gross receipts tax (a tax inherently more burdensome than the tax here at issue) based on the taxpayer's claim that the tax created a risk of multiple taxation. In *Standard*, as in this case, it was conceded that actual multiple taxation did not exist, but argued that the risk that another state might tax the same tax base created an impermissible risk of multiple burden. In this case, Mobil argues that New York might impose an unapportioned tax on 100% of its dividends which are included in Vermont's tax base before apportionment. In *Standard*, this Court held:

> "We noted in *General Motors* that a vice in a tax on gross receipts of a corporation doing an interstate business is the risk of multiple taxation; but that the burden is on the taxpayer to demonstrate it. . . . The corporation made no such showing there. Nor is any effort made to establish it here." (*Id.*, at page 563).

State Taxation of Interstate Businesses and the Multistate Tax Compact: The Search for a Delicate Uniformity, Columbia Journal of Law and Social Problems, 231 (1975). Cited in Footnote 13, at page 278 of *Moorman*.

Even if the constitutional test is a risk of multiple taxation, the possibility that another state might at some time in the future impose a tax creating a multiple burden was found insufficient under *Standard* to establish a violation of the Commerce Clause. Accordingly, Mobil, like Standard, has failed to establish the essential factual predicate for a claim of multiple taxation. Whether the requirement is a showing of a substantial risk, or actual multiple taxation, Mobil has failed to establish either, and the Record on which Mobil bases its claim is insufficient.

Not only does the possibility that New York might, in the future, attempt to tax 100% of Mobil's dividends fail to establish an unconstitutional risk of double taxation, Mobil's argument that the Constitution grants to states of commercial domicile the power to tax, without apportionment, all income received as dividends lacks support in the decisions of this Court and the economic realities of interstate commerce.

Mobil's argument that the doctrine of *mobilia seguuntur personam* requires allocation of 100% of dividend income to the state of commercial domicile exalts fiction over reality. This medieval maxim, with no unequivocal constitutional source, was developed in early inheritance and property tax cases. Its application, in the context of a tax on fairly apportioned net income, has no discernable merit. The doctrine of fair apportionment proceeds from the principle that a state which provides services, opportunities and protections has a right to impose taxes which bear a fair relationship to the value of the benefits provided. The *mobilia* doctrine would allocate all income from intangible property to a single state based on a unilateral business choice of commercial domicile, without regard to the extent of business activities in other states, or the privileges, opportunities and protections provided by those states. In the critical area of state taxa-

tion of net income, the anachronistic and economically unrealistic *mobilia* doctrine should yield to a rule of fair apportionment.[16]

The so-called fiscal policy considerations advanced by Mobil in support of the *mobilia* doctrine, applied to the facts in this case, support the choice of fair apportionment rather than 100% allocation to New York. Mobil has not alleged or proved any relationship between the location of its management and custodial activities and the State of New York nor has it shown that New York provided any benefits or protections or incurred any social costs in connection with its stockholdings. Vermont, on the other hand, provided significant markets—a critical element in Mobil's integrated worldwide petroleum business. The *mobilia* doctrine would grant to New York the power to tax solely because it was selected by Mobil as its commercial domicile, and deny Vermont the ability to claim fair compensation for the opportunities, privileges and protections provided. Surely, the Constitution does not require or support such a result.

IV. *This Court's Decision in* Japan Line, Ltd., *Is Not Precedent for Its Decision on Mobil's Claims.*

Finally, with its risk of multiple taxation theory foreclosed by *Moorman*, Mobil argues for a more restrictive test because the component items of net income at issue were, it asserts, "foreign source" dividends. Citing *Japan Line* (*supra*), as precedent, Mobil asks this Court to declare that the risk of taxation of its dividends by more than one state, which may result from diverse methods of apportionment, is prohibited by the Commerce Clause because some of its dividends were paid by foreign operating subsidiaries and affiliates.

---

[16] Mr. Justice Stewart's concurring opinion in *California v. Texas*, (437 U.S. 601 [1978]) suggests that the Court if ever faced with multiple taxation by the states arising from multiple state contacts would resolve the conflict by some method of apportionment rather than resort to a "single 'correct' answer under state common law." (*Id.* at page 613).

Mobil asserts that:

> "Although there are factual differences between *Japan Line* and the case at bar, none warrants a different result." (Appellant's Brief, at page 24).

In fact, the cases differ in so many significant respects that the issues and considerations raised in *Japan Line* bear no resemblance to those here presented. A review of only a few of the significant differences should suffice to prove this point.

First, as previously stated, only Mobil's net income apportioned to its activities in Vermont was subject to the Vermont tax. Mobil has neither asserted nor proved that its net income apportioned to Vermont had any relationship with foreign commerce. The only connection with foreign commerce on the Record is that Mobil's operating subsidiaries and affiliates are alleged to conduct business outside the United States. By so arguing, Mobil confuses its business activities with the business activities of its operating affiliates and subsidiaries.

A second significant difference is that in *Japan Line*, the tax at issue was an ad valorem property tax. The constitutional standards applied to such taxes are based on entirely different considerations from those applicable to a tax on apportioned net income.

A third significant difference is that in *Japan Line*, actual multiple taxation by a state and a foreign nation was found to exist. Mobil admits that Vermont's apportioned net income tax creates no duplicative taxation of its net income but asserts a mere speculative risk of possible multiple burden. A critical element in this Court's analysis and decision in *Japan Line* was the fact that a foreign sovereign had imposed a tax on the property at issue. Because the Court lacks the power to limit taxa-

tion by foreign nations, it lacked the power to correct unfair apportionment which might exist. The risk of multiple taxation asserted here is the risk that more than 100% of Mobil's net income will be exposed to taxation by overlapping state formulas. Accordingly, all taxing authorities involved are subject to the Court's jurisdiction. To suggest, as Mobil does, that this is a distinction without difference, is preposterous. Obviously it was to precisely that overlap that this Court referred when it said:

> "Errors of apportionment that may lead to multiple burdens may be corrected when they occur." (*Department of Revenue of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 [1978]).

Conclusion

The order of the Vermont Supreme Court should be affirmed.

Dated: August 20, 1979

Respectfully submitted,

RICHARD JOHNSTON KING
The Valley Professional Center
Waitsfield, VT 05673
Tel.: (802) 496-4371

GREGORY A. MCKENZIE
Deputy Attorney General
Pavilion Office Building
Montpelier, VT 05602
Tel.: (802) 828-3171

Attorneys for the Appellee

Appendix I

	1970	1971	1972
1. Federal Taxable Income	$220,035,244	$308,253,570	$232,825,728
2. Vermont Sales	8,554,200	9,175,931	9,589,447
3. Vermont Property	3,930,100	6,707,534	8,236,792
4. Vermont Payroll	236,553	244,577	254,938
5. Vermont Sales as a Percentage of Worldwide Sales	0.239134%	0.235924%	0.236787%
6. Vermont Property as a Percentage of Worldwide Property	0.136845%	0.223887%	0.250225%
7. Vermont Payroll as a Percentage of Worldwide Payroll	0.062118%	0.061131%	0.059440%
8. Vermont Apportionment Percentage	0.146032%	0.173647%	0.182151%
9. Federal Taxable Income Received in the Form of Dividends	174,211,073	282,817,008	280,623,403
10. *Percentage of Federal Taxable Income Received in the Form of Dividends	79%	92%	121%
11. Net Income Apportioned to Vermont Excluding Income Received in the Form of Dividends	30,361	(40,058)	(163,951)
12. *Net Income Apportioned to Vermont Including Income Received in the Form of Dividends	317,976	532,592	423,078
13. Vermont Tax Excluding Income Received in the Form of Dividends	1,821	25	25
14. *Vermont Tax Including Income Received in the Form of Dividends	19,078	31,955	25,384

* Not reported by Mobil on Vermont tax returns, as filed, calculated on the basis of information contained in those returns.

FOR ARGUMENT

Supreme Court, U.S.
FILED
OCT 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—VS.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

APPELLANT'S REPLY BRIEF

JEROME R. HELLERSTEIN
80 Pine Street
New York, New York 10005
(212) 344-1279

JOHN DWIGHT EVANS, JR.
150 East 42nd Street
New York, New York 10017
(212) 883-4965

Attorneys for Appellant

Of Counsel:

WILLIAM B. RANDOLPH
80 Pine Street
New York, New York 10005

October 25, 1979

TABLE OF CONTENTS

PAGE

I. The Foreign Dividends at Issue Are Not Includible in the Vermont Apportionable Base, Even If It Should Be Assumed That the Corporations Which Paid the Dividends Were Part of a Unitary Business 1

A. Since Vermont Apportioned Mobil's Income on a Separate Company Basis Without Taking Into Account the Apportionment Factors of the Foreign Dividend Paying Corporations, the Unitary or Non-Unitary Business Relationship of Those Corporations to Mobil Has No Bearing on the Constitutionality of Vermont's Apportionment 1

B. The Due Process Clause Does Not Sanction Inclusion in a Separate Company Apportionment of Dividends That Have No Connection With the Taxpayer's Own Operations and Activities in the State, Even If the Underlying Corporations Are Unitary With the Taxpayer 6

II. The Vermont Statute Does Not Disallow Deductions Attributable to Dividends Excluded From the Apportionable Tax Base, as Was Established in the Proceedings Below in the Instant Case 13

PAGE

III. The Contention That the Foreign Source Dividends Should Be Included in the Tax Base Because Mobil Will Otherwise Not Pay Taxes That Bear a "Fair Relationship" to the Benefits It Receives From Vermont Is Based on an Erroneous Assumption as to the Vermont Taxes Payable by Mobil and Seeks to Substitute the Commissioner's Judgment of "Fair Relationship" for the Legislative Determination Embodied in the Vermont Tax Structure.. 15

IV. Mobil's Activities as the Owner of Stocks and as the Recipient of Foreign Source Dividends Constitute Foreign Commerce 17

V. The Contention That There Is No Substantial Risk of Multiple Taxation of Mobil's Foreign Source Dividends Is Not Supported by the State Laws 19

VI. Nothing Offered by the Opposing Briefs Has Shaken Mobil's Contentions That Under the Due Process Clause, Only the State of the Commercial Domicile or the Business Situs of the Stocks May Include the Dividends in Its Income Tax Base; and That Under the Foreign Commerce Clause, Such Foreign Source Dividends Should Be Held Taxable Only by the State of Commercial Domicile or the Business Situs of the Stocks 21

PAGE

A. Neither the Authorities Nor Fiscal Policy Cited Warrant Apportionment of the Dividends at Issue to a State in Which the Taxpayer Does Not Maintain Its Commercial Domicile and in Which the Stocks Have Not Acquired a Business Situs 21

B. The Principles Enunciated in Japan Line Point to the Limitation of the Power of Taxation of the Foreign Source Dividends to a Single State 26

VII. There Is No Basis for the Spectres Raised by *Amici* That Other Types of Income or Property Would Be Placed Beyond the Taxing Powers of the States if Mobil's Contentions Should Be Upheld 28

VIII. In the Silence of Congress, Apportionment of Foreign Source Dividends by All the States in Which the Recipient Corporation Is Taxable Would Be Neither Constitutional Nor an Acceptable Resolution of the Issue in This Case 33

CONCLUSION 38

APPENDIX D—

Analysis of Allocation and Apportionment of Dividends By States Whose Classification in Appendix B to Appellant's Brief Has Been Challenged 1a

Table of Authorities

Cases: PAGE

Appeal of Houghton Mifflin Co., Calif. State Bd. of Equal. (1946), P-H Calif. Taxes on Corporate Income—Cases, ¶ 13,060 29
Appeal of International Business Machines Corp., Calif. State Bd. of Equal. (1954), P-H Calif. Taxes on Corporate Income—Cases, ¶ 13,143 29

Bass, Ratcliff & Gretton v. *State Tax Comm.*, 266 U.S. 271 (1924) 10

California v. *Texas*, 437 U.S. 601 (1978) 22, 23
Container Corporation of America v. *Franchise Tax Board*, Cal. Super. Ct. City and County of San Francisco, No. 673-492 (unpublished) (1979) 31

Fargo v. *Hart*, 193 U.S. 490 (1904) 7, 8
First Bank Stock Corp. v. *Minnesota*, 301 U.S. 234 (1937) 26
Flint v. *Stone Tracy Co.*, 220 U.S. 107 (1911) 24, 25

General Trading Co. v. *State Tax Commission*, 322 U.S. 335 (1944) 5
Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) 17
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975) 17

Hughes v. *Oklahoma*, 47 U.S.L.W. 4447 (Apr. 24, 1979) 19

Illinois Central R.R. v. *Greene*, 244 U.S. 555 (1917) 9
International Harvester Co. v. *Department of Treasury*, 322 U.S. 340 (1944) 33

PAGE

International Shoe Co. v. *Cocreham*, 246 La. 244, 164 So.2d 314 (1964), cert. denied *sub nomine Mouton* v. *International Shoe Co.*, 379 U.S. 902 (1964) 35

Japan Line Ltd. v. *County of Los Angeles*, 47 U.S.L.W. 4477 (April 30, 1979) 26, 27

Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 35
Kosydar v. *National Cash Register Co.*, 417 U.S. 62, 71 (1974) 27

Louisville & Jeffersonville Ferry Co. v. *Kentucky*, 188 U.S. 385 (1903) 22

McCarroll v. *Dixie Greyhound Lines*, 309 U.S. 176 (1940) 36
McLeod v. *Dilworth Co.*, 322 U.S. 327 (1944) 5
Mobil Oil Corporation v. *Franchise Tax Board*, Cal. Super. Ct. City and County of San Francisco, No. 723-863 (pending) 31
Moorman Manufacturing Co. v. *Bair*, 437 U.S. 267 (1978) 10, 32

New York ex rel. Whitney v. *Graves*, 299 U.S. 366 (1937) 22
Norfolk & Western Ry. Co. v. *Missouri State Tax Commission*, 390 U.S. 317 (1968) 10
North American Co. v. *SEC*, 327 U.S. 686 (1946) 2, 18
Northwestern States Portland Cement Co. v. *Minnesota*, 358 U.S. 450 (1959) 37

Paul v. *Virginia*, 75 U.S. (8 Wall.) 168 (1868) 17
Prudential Insurance Co. v. *Benjamin*, 328 U.S. 408 (1946) 35

PAGE

Radovich v. *National Football League*, 352 U.S. 445 (1957) 17

Southern Ry. Co. v. *Kentucky*, 274 U.S. 76 (1927) 9
Sperry & Hutchinson Co. v. *Department of Revenue*, 270 Or. 329, 527 P.2d 729 (1974) 28, 29

T.V. Williams as State Revenue Commissioner v. *Stockham Valves and Fittings, Inc.*, 358 U.S. 450 (1959) 37

Union Tank Line Co. v. *Wright*, 249 U.S. 275 (1919) .. 7
United States v. *International Boxing Club*, 348 U.S. 236 (1955) 17
United States v. *Shubert*, 348 U.S. 222 (1955) 17
United States v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944) 17

Wallace v. *Hines*, 253 U.S. 66 (1920) 8, 9
Wheeling Steel Corp. v. *Fox*, 298 U.S. 193 (1936) 21

Constitution:

Commerce Clause, Article I § 8 cl. 3..... .....8, 17, 18, 21, 26, 31, 32, 36, 37

Due Process Clause, Amendment XIV § 1 .....4, 5, 6, 7, 8, 9, 11, 21, 36, 37

Enabling Clause, Amendment XIV, § 5 35

Statutes:

Arkansas Statutes Annotated
§ 84-2020.2 14
§ 84-2020.3 14

PAGE

Hawaii Revised Statutes
§ 235-5(c) 14

Montana Revised Codes Annotated
§ 84-1502 14

New Hampshire Revised Statutes Annotated
§ 77-A:1 14
§ 77-A:3 14

New Jersey Revised Statutes
§ 54:10A-4(K) 14
§ 54:10A-6 14

South Carolina Code
§ 12-7-1120 14

Vermont Statutes Annotated, Title 32
§ 3001 *et seq.* 16
§ 3617 *et seq.* 16
§ 3691 16
§ 4003 *et seq.* 16
§ 8801 *et seq.* 16
§ 9701 *et seq.* 16

Other Authorities:

Altman & Keesling, Allocation of Income in State Taxation, (2d ed. 1950) 3

Boren, Specific Allocation of Corporate Income in California: Some Problems in the Uniform Division of Income for Tax Purposes, 30 Tax L. Rev. 607 (1975) 6

Dexter, Taxation of Income from Intangibles of Multistate-Multinational Corporations, 29 Vand. L.Rev. 401 (1976) 24, 25, 30

PAGE

Freund, Umpiring the Federal System, 54 Columbia L.Rev. 561 (1954) 35, 37

Hearings on State Taxation of Interstate Commerce, Subcommittee on State Taxation of Interstate Commerce, Senate Committee on Finance (93rd Cong., 1st Sess., Sept. 18-19, 1973) 4, 29, 34, 35

Keesling & Warren, The Unitary Concept in the Allocation of Income, 12 Hastings L.J. 42 (1960) 3, 5

Rudolph, State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Groups, 25 Tax L.Rev. 171 (1970) 3, 5

S. 1245, 93d Cong., 1st Sess. § 201 (1973) 34, 35, 36

S. 2092, 93d Cong., 1st Sess. § 301 (1973) 34, 35, 36

S. 2173, 95th Cong., 1st Sess. § 301 (1977) 35, 36

State Taxation of Interstate Commerce, Report of Special Subcommittee on State Taxation of Interstate Commerce, House Committee on the Judiciary (88th Cong., 2d Sess. 1964) 3

Stern, The Commerce Clause and the National Economy: 1933-1946, 59 Harv. L.Rev. 883 (1946) 35

Surrey, Warren, McDaniel and Ault, Federal Income Taxation, Cases and Materials (1972 ed.) 12

Testimony of Jerome Hellerstein, Hearings on State Taxation of Interstate Commerce Subcommittee on State Taxation of Interstate Commerce, Senate Committee on Finance (93rd Cong., 1st Sess., Sept. 18, 1973) 34

Tribe, American Constitutional Law (1978) 35

Uniform Division of Income for Tax Purposes Act 6, 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—VS.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

APPELLANT'S REPLY BRIEF

I.

The Foreign Dividends at Issue Are Not Includible in the Vermont Apportionable Base, Even If It Should Be Assumed That the Corporations Which Paid the Dividends Were Part of a Unitary Business.

A. *Since Vermont Apportioned Mobil's Income on a Separate Company Basis Without Taking Into Account the Apportionment Factors of the Foreign Dividend Paying Corporations, the Unitary or Non-Unitary Business Relationship of Those Corporations to Mobil Has No Bearing on the Constitutionality of Vermont's Apportionment.*

The question as to whether the subsidiaries and the other corporations from which Mobil received the foreign source dividends at issue were part of a unitary enterprise was not an issue at any stage of administrative or judicial

proceedings in this case, because that question is not relevant to the Vermont method of taxation and apportionment of dividends.[1] Nevertheless, the Commissioner and the *amici curiae* supporting Vermont's position contend before this Court that if the dividends did constitute part of a unitary business, there is no constitutional prohibition on their apportionment by Vermont, and that it was Mobil's burden to establish that the corporations that paid the foreign source dividends are not unitary.[2] We submit that this contention is without merit.

There are two basic but inconsistent approaches open to a State in allocating or apportioning the income of a multicorporate structured enterprise that constitutes a unitary business. A State may determine the income of the taxable corporation on a combined apportionment basis. Under that method the measure of the tax includes the income

[1] Mobil by no means concedes that the subsidiaries and affiliates from which it received the foreign source dividends at issue are part of its unitary business, as that term is used for State tax purposes.

[2] Thus in the brief filed by Standard Oil Company of California ("Socal") it is contended:

> "But whether the stock certificates* of the subsidiaries in question were 'held' or 'managed' by Mobil outside of the State of Vermont, or whether the earnings out of which the dividends were paid had a foreign or domestic 'source,' are irrelevant to the due process issue now before the Court, *because those 'facts' say nothing about the relationship of the stockholdings or the companies from which the dividends were paid to Mobil's integrated, unitary petroleum business* conducted within as well as without the State of Vermont."

See, also, the Commissioner's Br. pp. 16 *et seq.*

* Counsel for Socal have erroneously stated the facts. The Stipulation does not state that the "stock certificates" were "held, managed and controlled" outside Vermont; it states that the "capital stocks" were so handled, managed and controlled. Stip. ¶ 11, App. 83. The stipulation, of course, refers to Mobil's management of its interest in the corporations whose stock it held. See *North American Co.* v. *SEC*, pp. 18 to 19, *infra*.

of all corporations that comprise the unitary business, whether or not they are taxable by the State.[3] Likewise, the property, payroll, receipts or other factors of all the combined corporations are taken into account in reaching the percentage of the entire net income of the group to be taxed to the taxable corporation.[4] Dividends paid by one member of the combined group to other members are eliminated, along with other intercompany items, since the measure of the tax is limited to income derived by the unitary enterprise from dealings with non-members of the group.[5]

That is not the method prescribed under the Vermont statute or followed by the Commissioner in administering the Vermont tax, nor was it used in assessing the tax at issue against Mobil. If the combined method had been used, the dividends received by Mobil from any other corporations that were part of its unitary business would have been excluded from the tax base as an intercompany item; and the issue presented in this case would not have arisen.

Instead, Vermont uses, and applied in the instant case, a separate company apportionment. Under this method, the income of the taxpayer alone and only its own apportionment factors are taken into account. In accordance with this method, in assessing the tax at issue, the Com-

[3] See 1 "State Taxation of Interstate Commerce", Report of Special Subcommittee on State Taxation of Interstate Commerce, House Committee on the Judiciary, pp. 244-246 (88 Cong., 2d Sess., 1964); Rudolph, "State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Groups", 25 Tax L.Rev. 171, 194-200 (1970); Altman & Keesling, Allocation of Income in State Taxation, 174 *et seq.* (2d Ed. 1950); Keesling & Warren, "The Unitary Concept in the Allocation of Income", 12 Hastings L.J. 42, 59 *et seq.* (1960).

[4] *Ibid.*

[5] See Rudolph *op. cit.* note 3 *supra*, 25 Tax L.Rev. at 200; Keesling & Warren *op. cit.* note 3 *supra*, 12 Hastings L.Rev. at 60.

missioner included in the measure of the tax assessed the income of Mobil alone as a separate company.[6] Likewise, the Commissioner apportioned Mobil's income on the basis of the property, payroll and receipts of Mobil alone as a separate company, without taking into account the factors of any companies whose dividend payments are at issue, which would all have been included in the denominators but not the Vermont numerators of the factors.[7] The separate company apportionment used by Vermont is the method employed by most States in taxing the income of multicorporate enterprises.[8]

In this case, therefore, the existence or non-existence of a unitary relationship between Mobil and corporations which paid the foreign source dividends at issue is irrelevant. Vermont's power to tax Mobil's foreign source dividends under the restraints on extraterritorial State taxation imposed by the Due Process Clause of the Fourteenth Amendment must be decided in the light of the method of taxation used by Vermont, not some other method that might have been employed, particularly where, as here, the tax results would differ.[9] That the State might be

[6] In Mobil's Vermont income tax returns for the years at issue, the apportionment was made by reference to the income and apportionment factors of Mobil alone. App. Ex. 1, 2 and 3, pp. A32-A73. In auditing the returns and making the assessment, no change was made by the Commissioner in the determination of Mobil's income and apportionment on a separate company basis. Determination of Appeal, J.S. App. A, 1a, 2a-3a.

[7] *Ibid.*

[8] See "Industry Statement on Proposed Interstate Tax Legislation", Hearings on State Taxation of Interstate Commerce, Subcommittee on State Taxation of Interstate Commerce, Senate Committee on Finance, pp. 260, 280-281 (93rd Cong., 1st Sess., Sept. 18-19, 1973).

[9] This principle may be illustrated by two cases, one involving a sales tax and the other a use tax, decided by this Court on the

(Footnote continued)

empowered to apportion Mobil's income on a combined basis with the corporations whose dividends are at issue, would afford no justification for including such dividends in the apportionable base on a separate company basis. The existence of a unitary relationship between corporations that are part of a multicorporate enterprise is a prerequisite to the use of combined apportionment,[10] but it adds nothing whatever to the State's constitutional power to include foreign source dividends in the tax base under the totally dissimilar separate company apportionment under which the Vermont tax was determined.

The question as to whether there is sufficient nexus between Vermont and Mobil's foreign source dividends to enable the State to include the dividends in the apportionable tax base must, therefore, be judged under the Due Process Clause by reference to Mobil's activities and operations in Vermont as a separate company, vis-a-vis the stocks and dividends in question. The record establishes

same day. In *McLeod* v. *Dilworth Co.*, 322 U.S. 327 (1944), the Court invalidated an Arkansas sales tax imposed on a Tennessee corporation based in Tennessee, which shipped goods from its Tennessee factory to customers in Arkansas, as a result of orders solicited by traveling salesmen, by mail or by telephone. In *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335 (1944), on essentially the same factual pattern involving a Minnesota based vendor which shipped goods to customers in Iowa, as a result of orders obtained by traveling salesmen, the Court held that Iowa had the power to impose a use tax on the Iowa customers and to require the out-of-state vendor to collect the tax. In the *Dilworth* case, the court stated:

> "It is suggested, however, that Arkansas could have levied a tax of the same amount on the use of these goods in Arkansas by the Arkansas buyers, and that such a use tax would not exceed the limits upon state power derived from the United States Constitution. Whatever might be the fate of such a tax were it before us, the not too short answer is that Arkansas has chosen not to impose such a use tax. . . ." (322 U.S. at 330).

[10] See Keesling & Warren, *op. cit.* note 3 *supra passim*; Rudolph, *op. cit.* note 3 *supra*, 25 Tax L.Rev. at 183-184.

that the stocks were held, managed and controlled by Mobil from its offices outside Vermont. (Stip. ¶11, App. 83). Payment of all dividends was received by Mobil outside Vermont, and Mobil's control, use and disposition of such dividends were managed and directed from Mobil's offices outside Vermont. *(Ibid.)* The facts also show that none of the dividends taxed had their source in Vermont earnings, and that none of the corporations paying the dividends did business, or had any offices, employees or property in, or derived any income from, Vermont. (Stip. ¶25, App. 88). In the circumstance, the conclusion appears inescapable that the "definite link", the "minimum connection", that is a *sine qua non* for State taxation simply did not exist between Vermont and Mobil's foreign source dividends, and, accordingly, that the tax is repugnant to the Due Process Clause.[11]

B. *The Due Process Clause Does Not Sanction Inclusion in a Separate Company Apportionment of Dividends That Have No Connection With the Taxpayer's Own Operations and Activities in the State, Even If the Underlying Corporations Are Unitary With the Taxpayer.*

In challenging Mobil's Due Process contention, the opposing briefs place great emphasis on the fact that the Vermont tax is not imposed on the foreign source divi-

[11] One of the Commissioner's *amici* declares that Mobil seeks to apply "separate accounting" to the taxation of the dividends at issue (Multistate Tax Commission ["MTC"] Br. 35, 39). That is an erroneous statement. Mobil contends that *allocation* as distinguished from *apportionment*—not separate accounting—of the dividends is required. For definition of these terms, see Boren, "Specific Allocation of Corporate Income in California: Some Problems in the Uniform Division of Income for Tax Purposes", 30 Tax L.Rev. 607, 610-613 (1975). Counsel for the MTC should be familiar with the use of allocation, as distinguished from separate accounting, since allocation is used by the Uniform Division of Income for Tax Purposes Act ("UDITPA") for non-business dividents, interest, royalties and the like (see §§4-8, P-H State & Local Tax Serv. (hereafter referred to as "P-H") All States ¶91,409-A), and UDITPA is incorporated into the Multi-state Tax Compact. P-H All States, ¶6310.

dends, but that the dividends are included in the tax base apportioned under the statutory formula.[12] We are not oblivious to the distinction drawn in the cases between a tax on income or other tax measure and the use of such income or other measure as the base to which the apportionment formula is applied. Nevertheless, this point can be pressed too far, since the inclusion of a class of income in the apportionable tax base will usually increase the tax. The assertion that Vermont "merely" included the dividends in the apportionable base by no means ends the Due Process inquiry, contrary to the apparent position taken in at least one of the opposing briefs.[13] For this Court has held in a number of cases that the inclusion in the apportionable base of a tax of items lacking sufficient nexus to the State violates the Due Process Clause.

In *Union Tank Line Co.* v. *Wright* (249 U.S. 275, 286 [1919], the Court said:

> "In Fargo v. Hart, *supra*, we condemned an assessment ostensibly proportioned to mileage where property without the State and unnecessary to the Express Company's actual business had been included; and we pointed out that under no formula can a State tax things wholly beyond its jurisdiction."

Fargo v. *Hart* (193 U.S. 490 [1904]) dealt with an Indiana property tax on American Express Company. The

[12] Comm'r. Br. 13 *et seq.*; MTC Br. 37 *et seq.*; Socal Br. 6 *et seq.*

[13] ". . . the fact that the Vermont tax base, prior to apportionment, included dividend income from out-of-state properties and activities is totally irrelevant . . . To the extent dividend income is attributable to out-of-state properties and activities, this is reflected in a determination of apportionable income and the apportionment factors." MTC Br. 48.

It should also be observed that in making the assessment at issue, the Commissioner did not take into account the apportionment factors of the dividend paying companies. Nor were the dividends included in either the numerator or the denominator of the receipts factor of the apportionment formula.

assessment properly took into account the value of the good will and other intangibles used in the business in Indiana. The apportionment had been made under the "unit rule" (now termed the unitary business rule), using a line mileage formula. The taxpayer contended that the inclusion in the apportionable base of the tax of stocks, bonds and other securities in New York violated the Due Process and Commerce Clauses. The State sought to support the tax by contending that "the property [the securities] ought to enter into the valuation, because wherever situated it was used in the business; if not otherwise, at least as giving credit necessary for carrying the business on." (193 U.S. at 498). However, this Court after observing that the unit method:

> "may be made a means of unlawfully taxing the privilege, or property outside the State, under the name of enhanced value or good will, if it is not closely confined to its true meaning",

struck down the tax as "an attempt to tax property beyond the jurisdiction of the State, and to throw an unconstitutional burden on commerce among the States." (Holmes, J., 193 U.S. at 500, 502).

The same principle was applied to the apportionment of the capital stock of a railroad operating in several States under a North Dakota tax imposed on the privilege of doing business in the State. In *Wallace* v. *Hines* (253 U.S. 66 [1920]), the value of the railroad's capital stock was apportioned in the ratio of the company's track mileage in the State to its total track mileage. The taxpayer challenged the inclusion in the apportionable base of the value of the railroad's stocks and bonds. A preliminary injunction against the enforcement of the tax was sustained by a unanimous opinion of this Court, in which Mr. Justice Holmes stated:

> "The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. *The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State.* Therefore, no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State. Hence the possession of bonds secured by mortgage of lands in other States, or of a land-grant in another State or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State. St. Louis Southwestern Ry. Co. v. Arkansas, 235 U.S. 350, 364. In this case, it is alleged, the tax commissioner's valuation included items of the kind described to very large amounts. The foregoing considerations justify the preliminary injunction that was granted against what would appear to be an unwarranted interference with interstate commerce and a taking of property without due process of law. Fargo v. Hart, 193 U.S. 490. Union Tank Line Co. v. Wright, 249 U.S. 275, 282." (253 U.S. at 69-70; emphasis added).[14]

A recent opinion of this Court put the Due Process limitation on apportionment as follows:

---

[14] *Accord: Southern Ry. Co.* v. *Kentucky*, 274 U.S. 76, 82-84 (1927); see *Illinois Central R.R.* v. *Greene*, 244 U.S. 555, 562-563 (1917).

> "... A State will not be permitted, under the shelter of an imprecise allocation formula or *by ignoring the peculiarities of a given enterprise*, to 'project the taxing power of the state plainly beyond its borders.' Nashville, C. & St. L. R. Co. v. Browning, 310 U.S. 362, 365 (1940). Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State." (*Norfolk & Western Ry. Co.* v. *Missouri State Tax Commission*, 390 U.S. 317, 325 [1968]; emphasis added.)

These cases and our contention are not at odds with the proposition stated in the cases relied on in the opposing briefs, that an apportioned tax "does not purport to identify the precise geographical source of a corporation's profits",[15] or that in imposing an apportioned tax on doing business the State may look "to the property of such corporations beyond its borders".[16] Those cases dealt with the inclusion of out-of-state income, property or other items of the taxpayer that were all integral parts of the business being apportioned on a unitary basis. The crucial difference between such cases and the instant case lies in the fact that the manufacture of ale in England and its sale in the United States in *Bass Ratcliff*, and the manufacture of animal foods in Illinois and their sale in Iowa in *Moorman* were all part of the enterprises whose income was apportioned on a unitary basis and that the property or receipts—i.e., the apportionment factors—in England and Illinois were taken into account in making the New York and Iowa assessments. Those cases would be relevant to

[15] *Moorman Manufacturing Co.* v. *Bair*, 437 U.S. 267, 273 (1978); Comm'r. Br. 12-13; MTC. Br. 38.

[16] *Bass, Ratcliff & Gretton* v. *State Tax Comm.*, 266 U.S. 271, 282 (1924); Comm'r. Br. 14-15; MTC. Br. 45-47.

the case at bar if Vermont had taxed Mobil as a component of a unitary business and had made the apportionment on a combined basis that took into account the income and factors of the foreign subsidiaries. But because Vermont has apportioned Mobil's income on a separate company basis, the integration or unity of the operations of Mobil's foreign subsidiaries and affiliates with the selling of gasoline and fuel oil and the like in Vermont cannot be used to justify the inclusion in the Vermont tax base of the dividends on such stocks.

Since, therefore, Mobil's foreign source dividends cannot be linked under the Due Process Clause with Vermont on the theory that the operations of the dividend paying corporations are unitary with Mobil's product sales in Vermont, there is no link between Mobil's dividend income and Vermont that justifies, under the Due Process Clause, the inclusion of the dividends in the apportionable tax base.

The Commissioner, however, contends that there may be other links between Mobil's foreign dividends and Vermont. He contends that it may be inferred that the foreign dividend income may have been used by Mobil to finance its daily operations in Vermont, to purchase or finance property in the State, to purchase or finance petroleum products marketed in Vermont, or otherwise benefit its business activities in the State. (Comm'r.'s Br. 17). The premise of this argument, that income may be taxed by a State or may be included in its apportionable base because, after it has been realized, the income is spent in the State, would push jurisdiction to impose corporate income taxes to an unprecedented and an unwarranted extreme. The entire concept of taxable income is that it is taxed as it is received or accrued, and its taxability is determined at that

point.[17] Once the income is received or accrued, we had supposed that the income tax collector is done with it, and that the way in which it is spent has not the slightest bearing on its taxability. To illustrate the startling results that the Commissioner's extreme position would entail, if Mobil owned the stock of a West German corporation manufacturing widgets in Frankfurt and selling them in various parts of Europe, and the management, control and direction of Mobil's investment in the widget manufacturer, and the receipt and disposition of dividends paid by that company were determined and controlled by Mobil entirely outside Vermont, we submit that it is unthinkable that the dividends would be includible in the apportionable base of an income tax imposed on Mobil by Vermont, on the ground that the dividends were used to build a filling station in Burlington or to purchase heating oil for sale to Vermonters. The only difference between the actual facts of the case before this Court and the hypothetical case is that the widget business and the petroleum business are obviously not part of a unitary enterprise. But that difference is made irrelevant to the instant case, because Vermont has eschewed the unitary apportionment method and has not apportioned Mobil's income on a combined basis with the dividend paying corporations. Consequently, given Vermont's apportionment of Mobil's income on a separate company basis, the only link between the foreign source dividends received from Mobil subsidiaries and affiliates and Vermont would be the use of the income in that State. That fact, accordingly, lays no greater foundation for inclusion of Mobil's foreign dividends in Vermont's apportionable base than would be the case with respect to the dividends from the widget manufacturer that are similarly expended.

[17] See Surrey, Warren, McDaniel and Ault, *Federal Income Taxation, Cases and Materials*, pp. 681-687 (1972 ed).

II.

The Vermont Statute Does Not Disallow Deductions Attributable to Dividends Excluded From the Apportionable Tax Base, as Was Established in the Proceedings Below in the Instant Case.

The Commissioner and some of the *amici* supporting his position contend that it would be improper to exclude Mobil's foreign source dividends from the apportionable base without disallowing the costs and expenses attributable to the holding and managing of the stocks. (Comm'r. Br. 18-19; Ill., Conn., Mass. and N.H. Br. 7, note 4). Whether or not such a rule would constitute wise tax policy, the Vermont law does not provide for such disallowance, as the Vermont court determined in the instant case.

A determination of Mobil's net income under the Vermont income tax law, with the dividends at issue excluded, had to be made by the Vermont Superior Court, since that tribunal had upheld the contention that the foreign source dividends were not includible in the apportionable base of the tax. (J.S. App. B, 14a-16a). The Superior Court, accordingly, remanded the case to the Commissioner for a redetermination of Mobil's tax in accordance with the decision (*Id.* at 16a). The redetermination was made by stipulation of counsel, on the basis of which the Superior Court entered its order establishing the amount of Mobil's tax liability for each of the years at issue. (J.S. App. B). Since the Commissioner had stipulated that Mobil's tax was thus properly determined under the Vermont law if the Superior Court was correct in its decision that the dividends at issue were not includible in the tax base, no question was raised at any point on the Commissioner's appeal to the Vermont Supreme Court that Mobil's tax as

thus determined was erroneous because of a failure to disallow as deductions the costs and expenses attributable to the stockholdings.

Moreover, the stipulated tax was properly determined under the Vermont law. The statute contains no provision for reducing the apportionable net income base by expenses or deductions attributable to dividends excluded from the base. (Br. App. A, 1a-3a). Although the statutes of some States disallow the costs and expenses attributable to income neither apportionable nor allocable to the State,[18] there are a number of States whose income tax laws, like the Vermont statute, contain no provision disallowing such deductions.[19] Accordingly, there is no basis for a contention before this Court that the foreign source dividends at issue should not be excluded from Mobil's Vermont income tax base without a disallowance of the costs and expenses attributable to the stockholdings.

[18] See Ark. Stat. Ann. §§84-2020.2, 3, CCH Ark. ¶¶94-549, 550; Haw. Rev. Stat. §235-5(c), CCH Haw. ¶11-035; S.C. Code §12-7-1120, CCH S.C. ¶12-435.

[19] See Mont. Rev. Codes Ann. §84-1502, CCH Mont. ¶10-301; N.H. Rev. Stat. Ann. §77-A:1, 3, CCH N.H. ¶¶15-060, 350; N.J. Rev. Stat. §§54:10A-4(K)-6, CCH N.J. ¶¶5-710, 805.

III.

The Contention That the Foreign Source Dividends Should Be Included in the Tax Base Because Mobil Will Otherwise Not Pay Taxes That Bear a "Fair Relationship" to the Benefits It Receives From Vermont Is Based on an Erroneous Assumption as to the Vermont Taxes Payable by Mobil and Seeks to Substitute the Commissioner's Judgment of "Fair Relationship" for the Legislative Determination Embodied in the Vermont Tax Structure.

The Commissioner makes the extraordinary contention that the foreign source dividends should be included in the apportionable base of the tax, because otherwise Mobil's tax for the three years at issue would be so small ("only $1178") as to "bear no fair relationship to the protections, opportunities and benefits provided by the taxing state or to the profits generated from business conducted in that state."[20] This contention is based on the fact that Mobil had substantial property and payroll and made substantial sales in Vermont. (Comm'r. Br. 19-20).

The trouble with this argument is that the Commissioner has substituted his own notions, albeit vague and undefined, as to what constitutes a "fair relationship" of the tax that should be paid for the "protections, opportunities and benefits provided by the taxing state", for the standards adopted by the Vermont Legislature. When the Legislature enacted *an income tax* on foreign corporations as a *quid*

[20] Comm'r. Br. 20. The figure of $1,178 used in the Commissioner's brief is inaccurate if it is designed to reflect Mobil's Vermont income tax liability for the years at issue with the dividends excluded from the apportionable tax base. The correct figure for Mobil's income tax for the three years is $4,155.90. See J.S. App. 17a.

pro quo payable for such benefits, it necessarily recognized that corporations would pay no income tax unless they realized profits, including profits that are attributable to the business carried on in Vermont, regardless as to whether they had substantial property, payroll and sales in the State. Consequently, the Commissioner's argument that the Vermont income tax would not bear a "fair relationship" to the benefits afforded Mobil by Vermont, because the exclusion of the foreign source dividends from Mobil's tax base would result in only a "small amount" of income tax, is both a *non-sequitur*, and an attempt by the Commissioner to substitute his own measure of "fair relationship" for that enacted by the Legislature.

The Commissioner's argument also suffers from the further defect that it assumes that the income tax is the only tax price Mobil pays to the State of Vermont for the benefits afforded by the State. That, of course, is a far cry from the facts, since Mobil is subject to a variety of other Vermont taxes as *quid pro quo* for the protections, opportunities and benefits it receives from the State. There are real estate taxes on land and buildings,[21] personal property taxes, including a tax on inventory[22] or alternative business personal property taxes.[23] Mobil is also subject to the Vermont tax on distributors of gasoline and other motor fuels sold in the State,[24] and to sales or use taxes on tangible personal property purchased for use in the State.[25]

[21] Vt. Stat. Ann. Tit. 32, §3001 *et seq.*, Vt. P-H ¶32,329, *et seq.*

[22] Vt. Stat. Ann. Tit. 32, §§3691, 4003 *et seq.*, Vt. P-H ¶¶32,410, 32,508 *et seq.*

[23] Vt. Stat. Ann. Tit. 32, §3617 *et seq.*, Vt. P-H ¶32,380 *et seq.*

[24] Vt. Stat. Ann. Tit. 32, §8801 *et seq.*, Vt. P-H ¶45,300 *et seq.*

[25] Vt. Stat. Ann. Tit. 32, §9701 *et seq.*, Vt. P-H ¶22,800 *et seq.*

IV.

Mobil's Activities as the Owner of Stocks and as the Recipient of Foreign Source Dividends Constitute Foreign Commerce.

The contention is made that Mobil's activities as the owner of the stocks of the corporations that paid the foreign source dividends at issue and the receipt by Mobil of dividends on the stocks did not constitute foreign commerce, and thus Mobil is not entitled to the protection of the Foreign Commerce Clause. (Comm'r Br. 25, MTC Br. 52-54). No case is cited in support of this contention, which appears to be based on the restrictive view of commerce expressed in *Paul* v. *Virginia* (75 U.S. [8 Wall.] 168, 183 [1868]) a century ago that "commerce" is limited to "subjects of trade and barter offered in the market", to "commodities to be shipped . . . from one State to another. . . ." That conception of what constitutes commerce has long since been repudiated. The Court, has instead, followed Chief Justice Marshall's view, as enunciated in *Gibbons* v. *Ogden* (22 U.S. [9 Wheat] 1 [1824]), that "Commerce, undoubtedly, is traffic, but is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches." (*Id.* at 188).

In 1944, the Court repudiated *Paul* v. *Virginia* (*United States* v. *South-Eastern Underwriters Association* [322 U.S. 533]), and has gone on since then to hold that the conduct in more than one State of such enterprises as professional sports, the production, booking and presentation of theatrical productions, and the rendition of legal services all constitute interstate commerce.[26]

[26] *Radovich* v. *National Football League*, 352 U.S. 445 (1957); *United States* v. *International Boxing Club*, 348 U.S. 236 (1955); *United States* v. *Shubert*, 348 U.S. 222 (1955); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975).

Any possible question as to whether Mobil's activities as the owner of the capital stocks of some 400 foreign operating corporations (Stip. ¶¶10, 28-33, App. 82, 89-90), its management of the stocks, and its receipt annually of some $175,000,000 to $280,000,000 in foreign source dividends from the stocks (Ex. 8, App. 75-76) constituted foreign commerce, was put to rest by this Court's decision in *North American Co.* v. *SEC* (327 U.S 686 [1946]). There a public utility holding company with investments in companies doing business in a number of States, sought to invalidate §11(b)(1) of the Public Utility Holding Company Act of 1935 on the ground that it violated the Commerce Clause. In rejecting this contention, the Court stated:

> "The mails and instrumentalities of interstate commerce are vital to the functioning of this system . . . without them, [petitioner] would be unable to . . . exercise and maintain the influence arising from its large stock holdings, receiving notices and reports, sending proxies to stockholders' meetings, *collecting dividends and interest*, and transmitting whatever instructions and advice may be necessary." (*Id.* at 694, emphasis added).

The Court concluded that "the ownership of securities of operating companies . . . has a real and intimate relation to the interstate activities of holding companies and cannot be effectively divorced therefrom." (*Id.* at 702).

This language, the Court's holding and a host of other cases completely dispose of the contention that Mobil's activities as the owner of the stocks of its subsidiaries and non-subsidiaries and its receipt of the foreign source dividends at issue do not constitute foreign commerce. It is established that the scope of what constitutes "commerce" is the same whether the Court is dealing with the validity

of Congressional regulation or a challenge to State action as violative of the Commerce Clause; hence the Congressional regulatory cases are authority for our position. (See *Hughes* v. *Oklahoma*, 47 U.S.L.W. 4447, 4448, note 2 [Apr. 24, 1979]).

V.

The Contention That There Is No Substantial Risk of Multiple Taxation of Mobil's Foreign Source Dividends Is Not Supported by the State Laws.

One of the *amici* (but not the Commissioner) has challenged Mobil's contention that there is a substantial risk of multiple taxation because of the diversity of State apportionment and allocation methods (MTC Br. 70 *et seq.*; see Appellant's Brief ["App. Br."] 26 *et seq.*). The MTC brief comments only on the differences among the States in the treatment of dividends, ignoring Mobil's demonstration of the numerous differences in various other aspects of the State formulas.

With respect to dividends, the MTC brief comments on Mobil's table in which the diverse methods of allocating or apportioning dividends by 34 of the States (including the District of Columbia) that tax foreign source dividends are set out, 27 of which apportion some or all of the dividends (App. Br., Appendix B, p. 4a). However, the MTC brief comments only on 13 of the 34 States, leaving Mobil's analysis of the 21 remaining States unchallenged. (MTC Br. 72-75). An analysis of the statutes and regulations of those 13 States (see Appendix D annexed hereto p. 1a.), demonstrates that at most some minor refinements or qualifications in the classification of several of those States may be appropriate, but our essential contention as to the wide diversity in their methods of allocating and apportioning foreign source dividends remains unshaken.

That analysis shows that in seven States all taxable dividends are allocated to the commercial domicile (or the State of the business situs of the stock), in 19 States business income dividends are apportioned and non-business dividends are allocated to the commercial domicile, and in the remaining 8 States taxing foreign source dividends all dividends are apportioned. Consequently, the astonishing assertion of the MTC that "there appears to be an almost unanimous consensus among the states that all unitary income of a unitary trade or business" is to be apportioned (MTC Br. 75) must be dismissed as overstatement.

The diversity in the allocation and apportionment of dividends by the various States is illuminated by the fact that six of the seven States that allocate taxable dividends to the taxpayer's commercial domicile or to the business situs of the stock, did not join in any of the briefs *amicus* supporting the Commissioner. Those States include California and Louisiana, which are regular or associate members of the Multistate Tax Compact. Moreover, the filing in the instant case of a brief *amicus* supporting the Commissioner by another international oil company, Standard Oil Company of California, whose commercial domicile is located in California, emphasizes the reality of the diversity as between California's allocation of taxable dividends to the State of commercial domicile and Vermont's attempt to apportion taxable dividends. Nor is it without significance that 19 of the States plus the District of Columbia that tax foreign source dividends failed to join in briefs *amici* supporting Vermont's position.

VI.

Nothing Offered by the Opposing Briefs Has Shaken Mobil's Contentions That Under the Due Process Clause, Only the State of the Commercial Domicile or the Business Situs of the Stocks May Include the Dividends in Its Income Tax Base; and That Under the Foreign Commerce Clause, Such Foreign Source Dividends Should Be Held Taxable Only by the State of Commercial Domicile or the Business Situs of the Stocks.

A. *Neither the Authorities Nor Fiscal Policy Cited Warrant Apportionment of the Dividends at Issue to a State in Which the Taxpayer Does Not Maintain Its Commercial Domicile and in Which the Stocks Have Not Acquired a Business Situs.*

The Commissioner and his *amici* have challenged Mobil's contention that the State of a corporation's commercial domicile, or the business situs of the stock if it has attained a situs in another State, has the exclusive power to allocate dividends *in toto* to the base of its tax. (Comm'r. Br. 23-24; MTC Br. 78 *et seq*) It is contended that the doctrine of *mobilia sequuntur personam*, which "was developed in early inheritance and property tax cases," has "no discernible merit" "in the context of a tax on fairly apportioned net income" (Comm'r. Br. 23; see, also, Socal Br. 13), and that property tax cases, such as *Wheeling Steel Corp.* v. *Fox,* 298 U.S. 193 (1936) relied on by Mobil, are not relevant to the allocation or apportionment of income from dividends. (Socal Br. 13; MTC Br. 80-81).

We disagree. This Court has applied the commercial domicile and business situs rules to all aspects of the taxation of intangibles, including taxes on the privilege of doing business measured by the value of assets[27] and in-

come based taxes.[28] Moreover, the power of the State of a corporation's commercial domicile to allocate to its tax base all the taxable dividends of a corporation has been sustained by intermediate Federal and by State courts. (App. Br. 29-30).

The opinion of Mr. Justice Stewart, concurred in by Justices Powell and Stevens, in *California* v. *Texas* (437 U.S. 601 [1978]) is cited for the view that "the Court if ever faced with the problem of multiple taxation arising from State contacts would resolve the conflict by some method of apportionment rather than resort to a 'single correct' answer under state common law". (Comm'r. Br. 24, note 16). The opinion does not bear out this assertion.

In *California* v. *Texas* the Justices were unanimous in denying a motion by the State of California for leave to file an original bill of complaint to settle a dispute with the State of Texas over the question as to which State had the power to collect death taxes from the Estate of Howard R. Hughes. Mr. Justice Stewart's concurring opin-

[27] *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U.S. 385 [1903]. There, a Kentucky franchise tax levied on transportation companies and measured by the value of their franchises was set aside because there was included in the tax base the value of a ferry franchise granted by Indiana. The Court said:

> ". . . the ferry franchise derived from Indiana is an incorporeal hereditament derived from and having its legal *situs* in that State. It is not within the jurisdiction of Kentucky. The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that State of the property of the ferry company without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States . . ." (188 U.S. at 398).

[28] *New York ex rel. Whitney* v. *Graves*, 299 U.S. 366 [1937]. In this case the court upheld a New York income tax on the profits realized by a non-resident member of the New York Stock Exchange from a sale of a "right" to a one-fourth membership in the exchange, to which he became entitled as a member, on the ground that the membership had a "business situs" in New York.

ion, which reaffirmed the power of the State of the domicile of a decedent to impose a death tax on all his intangibles,[29] was concerned with the problem that arises when "there are sufficient contacts with each State to support a finding of domicile under each State's law".[30] After referring to a possible resolution of the conflict by "a division of the assets of the estate based on a judgment as to the relative strength of the domicile claims", Justice Stewart indicated his preference for a "neutral principle rather than attempt to determine a single 'correct' answer under state common law."[31] As we read this opinion, even in the double domicile death tax cases, the division of assets method—which would be analogous to formulary apportionment—is rejected and, instead, a preference is expressed for lodging the power of taxation in a single State.

Justice Stewart's observations were not directed to a tax such as the Vermont tax on Mobil's foreign source divi-

[29] "As will be developed more fully, *infra*, at 607-610, intangible personal property may, at least theoretically, be taxed only at the place of the owner's domicile. First National Bank v. Maine, 284 U.S. 312." 437 U.S. at 602, note 1.

[30] 437 U.S. at 613.

[31] The full statement of the opinion on this point reads as follows:

> "In deciding the controversy between Texas and California the Court could, of course, determine, according to its own rules of decision where Hughes was domiciled when he died, and permit only the State of domicile to tax the estate. Cf. Texas v. New Jersey, 379 U.S. 674. But assuming there are sufficient contacts with each State to support a finding of domicile under each State's law—a premise of jurisdiction in Texas v. Florida—the Court could with equal validity decide that the proper disposition was a division of the assets of the estate based on a judgment as to the relative strength of the domicile claims, or on almost any other basis that seemed just. Indeed, for purposes of this Court's resolution of a dispute between two sovereign States, each of which has an equally valid claim under its own law, it would seem more appropriate to decide the case on some neutral principle rather than attempt to determine a single 'correct' answer under state common law." *Ibid.*

dends, since admittedly Vermont is not a State of Mobil's domicile. Nevertheless, the opinion is another instance, in addition to those cited by Mobil (App. Br. 34 *et seq.*), in which Justices have indicated the appropriateness of resolving some types of multiple State tax claims by sanctioning taxation exclusively by a single State.

Quoting *in extenso* from an article of its counsel, the MTC brief (82-85) contends that fiscal policy considerations and the decided cases support State apportionment of dividends and income from other intangibles to the extent that the intangibles and the income they produce constitute integral parts of a unitary business conducted in part in the taxing State (MTC Br. Pt. 2, pp. 78-79). However, the unquoted portions of the same article make it evident that the argument supporting the apportionment of dividends depends on a pattern of operations that does not exist in the case at bar. For after analyzing the authorities, Mr. Dexter concludes:

> "These decisions lend credence to the proposition that intangible income should be assigned on the basis of the underlying corporate activities that originally give rise to the income and pursuant to which the intangible investments and income are used." Dexter, "Taxation of Income from Intangibles of Multistate-Multinational Corporations," 29 Vand.L.Rev. 401, 417-418 [1976]).

Since none of the "underlying corporate activities" of Mobil that "gave rise" to its foreign source dividend income took place in Vermont, the argument is inapposite to the instant case.[32]

[32] The MTC brief (p. 44) quotes from *Flint* v. *Stone Tracy Co.* (220 U.S. 107, 166 [1911]), to support its contention that States other than the commercial domicile or business situs may tax in-

(Footnote continued)

Moreover, MTC counsel has taken the position that as a matter of fiscal policy, if a business is unitary, combined apportionment is the appropriate method of taxation, as a consequence of which intercompany dividends would be eliminated from the tax base.[33] Although counsel for the MTC contends throughout his brief that the stocks of Mobil and the dividends they produced constituted integral parts of a unitary business, Vermont has not adopted the fiscal policy MTC counsel has espoused.

The Commissioner characterizes the *mobilia* doctrine as "anachronistic and economically unrealistic." (Comm'r. Br. 24). Mr. Justice Stone, who was not given to "anachronistic and economically unrealistic" positions, explained the wisdom of the doctrine by saying:

> "The resort to a fiction by the attribution of a tax situs to an intangible is only a means of symbolizing, without fully revealing, those considerations which are

come from intangibles. That case upheld the power of Congress to impose an excise tax on the privilege of doing business by corporations organized under the laws of the States, measured by their net income. The Court's statement, quoted by the MTC brief, that "Nor can it be justly said that investments have no real relationship to the business transacted by a . . . corporation" (220 U.S. at 166), was made in response to the contention that the "measurement of the tax by the net income of the corporation . . . received by it from all sources is not only unequal, but so arbitrary and baseless as to fall outside the authority of the taxing power" (220 U.S. at 165). Of course, Mobil does not contend that its income from investments has no relation to its business, but that the dividend income at issue does not have sufficient nexus to the business it carried on in Vermont to justify its inclusion in the Vermont apportionable tax base.

[33] "Of course, if the parent's control over the affiliated corporations results in the parent conducting a unitary business with the affiliated corporations, combined reporting should be required. This would eliminate intercorporate transactions between the combined group. The parent would exclude from its taxable income the intangible income it would receive from the combined affiliates." (Dexter, *op. cit. supra*, 413-414 note 36).

persuasive grounds for deciding that a particular place is appropriate for the imposition of the tax.

* * *

The economic advantages realized through the protection, at the place of domicil, of the ownership of rights in intangibles, the value of which is made the measure of the tax, bear a direct relationship to the distribution of burdens which the tax effects. These considerations support the taxation of intangibles at the place of domicil, at least where they are not shown to have acquired a business situs elsewhere, as a proper exercise of the power of government. Like considerations support their taxation at their business situs, for it is there that the owner in every practical sense invokes and enjoys the protection of the laws, and in consequence realizes the economic advantages of his ownership." (*First Bank Stock Corp.* v. *Minnesota,* 301 U.S. 234, 240-241 [1937]).

B. *The Principles Enunciated in* Japan Line *Point to the Limitation of the Power of Taxation of the Foreign Source Dividends to a Single State.*

The Commissioner's argument that *Japan Line Ltd.* v. *County of Los Angeles,* (47 U.S.L.W. 4477 [Apr. 30, 1979]) is not a precedent for the case at bar is based on an enumeration of factual differences between the two cases. (P. 24 *et seq.*). Of course, there are differences between a property tax on ship containers owned by non-U.S. corporations, based in foreign countries, and an apportioned income tax on dividends derived by a U.S. corporation from foreign sources, levied by a State which is neither the taxpayer's commercial domicile nor the business situs of the stocks. But those differences are not the crux of the matter. *Japan Line* stands clearly for two legal conclusions *that are the crux of the matter:* (1) the Foreign Commerce Clause prohibits the States, notwithstanding fair apportionment, from subjecting foreign commerce to substantial risks of multiple taxation; (2) the limitation of State taxation to a single taxing jurisdicton may be required to eliminate such multiple taxation. These principles, we suggest, point to a resolution of the multiple taxation risk of foreign source dividends of the character at issue in this case in the same manner as that adopted by the Court in *Japan Line,* by limiting the taxing power to a single taxing jurisdiction.

If the Court should accept that view, its choice as between (a) allocation of the foreign source dividends *in toto* to the taxpayer's commercial domicile or the business situs of the stocks, and (b) apportionment of the dividends to all the States in which the taxpayer does business, appears unmistakable. The claims to taxation by the commercial domicile or business situs are overwhelming, while the claims of the other States are without justification. Moreover, allocation of the dividends to a single State will avoid multiple taxation of foreign source dividends, whereas apportionment will not. The suggested rule also has the virtue of simplicity, the importance of which this Court recently recognized in dealing with other aspects of State taxation of commerce.[34] Finally, as in *Japan Line,* State tax apportionment of foreign source dividends would conflict with long established Federal policy, in this case the policy of eliminating double taxation of foreign source income and encouraging the payment of foreign dividends, whereas allocation of the dividends to a single State would be in harmony with Federal policy.

---

[34] *Kosydar* v. *National Cash Register Co.,* 417 U.S. 62, 71 (1974).

VII.

There Is No Basis for the Spectres Raised by *Amici* That Other Types of Income or Property Would Be Placed Beyond the Taxing Powers of the States if Mobil's Contentions Should Be Upheld.

Amici (but not the Commissioner) contend that if Mobil's foreign source dividends cannot constitutionally be included in the Vermont income tax base, then it must follow that foreign source interest, royalties, and income from other intangible property will be removed from the taxing powers of the States, other than those of the commercial domicile of the owner of the property or the business situs of the intangible. (See MTC Br. 67-68; Ill., Conn., Mass., N.H. Br. 11-12). It is even argued that a decision favorable to Mobil in the case at bar will prevent the States from imposing property taxes on pleasure yachts owned by residents of the State and chartered to other residents, who cruise into foreign waters and make brief stopovers in foreign ports. (County of Los Angeles Br. 2). These sweeping assertions as to the consequences of a reversal of the Vermont Court are without merit. Each type of income or property presents its own tax problems, and may require resolution of a different character from that appropriate for the allocation or apportionment of foreign source dividends.

Thus, interest received by a corporation, whose commercial domicile is outside the taxing State, on securities in which it has invested funds not needed in its regular operations pending their use to acquire other businesses, which are held and managed entirely outside the taxing State, has been held not includible in that State's apportionable base. (*Sperry & Hutchinson Co.* v. *Department of*

Revenue, 270 Or. 329, 527 P.2d 729 [1974]). But interest on notes or accounts receivable arising from the sale of goods to customers is widely treated as operating income that is includible in the apportionable tax base.[35] And interest on funds invested in short term securities, acquired and held until the funds are needed in the corporation's regular business operations, has also been held to be apportionable. (*Sperry & Hutchinson Co.* v. *Department of Revenue, supra.*).

In the case of patent royalties, although the rule in some States is that "normally patents, trademarks, trade names, stocks and bonds and other intangibles have a situs for taxation at the domicile of the owner (Rainier Brewing Co. v. McColgan, 94 Cal. App. 2d 118; Miller v. McColgan, 17 Cal. 2d 432)", royalties, including those paid by foreign licensees, are apportionable to the various States in which a taxpayer conducts its business, where it is found that the royalties "constitute integral parts of the owner's regular business operations." (*Appeal of International Business Machines Corp.*, Calif. State Bd. of Equal. [1954], P-H Calif. Taxes on Corporate Income—Cases, ¶13,143.). The same principle has been applied to a book publisher's royalties from foreign sale of books. (*Appeal of Houghton Mifflin Co.*, Calif. State Bd. of Equal. [1946], *id.* at ¶13,060).

The crucial difference for State tax purposes between the income from intangibles treated as apportionable in the cases cited and Mobil's foreign source dividends is

---

[35] That is the method used in the MTC apportionment and allocation regulations, IV 1(c)(3), P-H All States ¶6130, and it is recognized as proper by spokesmen for business organizations. See Peters, "The Distinction Between Business Income and Nonbusiness Income", Hearings on State Taxation of Interstate Commerce, Subcommittee on State Taxation of Interstate Commerce, Senate Committee on Finance, pp. 246, 253 (93rd Cong., 1st Sess., Sept. 18-19, 1973).

that the interest and royalties arose from the taxpayer's own operating functions, whereas Mobil's dividends arose from the operating functions of the corporations whose stocks it owned. As operating income of the taxpayer, the interest and royalties, even though from foreign sources, were properly includible in the taxpayer's apportionable base by each of the States in which the operating business was conducted, unless the apportionment is barred by the Foreign Commerce Clause. We have not employed the confusing and unrealistic distinction between business and nonbusiness income used by UDITPA because we agree with counsel for the MTC that: "The UDITPA distinction between 'business' and 'nonbusiness' corporate income *appears to lack any rational basis* and has created confusion for taxpayers and tax administrators alike." (Dexter, "Taxation of Income from Intangibles of Multistate-Multinational Corporations", 29 Vand.L.Rev. 401, 407 [1976]; emphasis added). The more appropriate and realistic distinction is the dichotomy of "operating" and "non-operating" income, which we have utilized.[36]

Consequently, a reversal of the Vermont decision in the case at bar would be relevant to the power of the States to apportion foreign source non-operating interest, royalties and the like, but not to the power of non-domiciliary, non-business situs States to include in their apportionable tax bases foreign source interest or royalties and other income that constitute the taxpayer's operating income.

That is because multiple taxation of foreign source operating income presents different problems, and requires

[36] Counsel for the MTC has recognized that "Dividend income to the payee corporation is a separate class of income from the income produced by the business activities of the payor corporation". (Dexter, *ibid.*). Similarly, the same dividends constitute to the payee a separate class of income from its own operating income.

a different type of judicial resolution from those involved in multiple taxation of foreign source non-operating income. In cases now pending in the State courts, taxpayers are contending that the application of the standard three factor formula to foreign operating income subjects them to risks of multiple taxation that are prohibited by the Foreign Commerce Clause.[37] They argue, *inter alia,* that the formula is inherently distorting as applied to foreign source income,[38] and that the inclusion of the foreign source operating income of the taxpayer (and its subsidiaries in States that employ the combined reporting method in determining the apportionable base and the factors) results in the misattribution to the States of income earned in foreign countries, and thereby subjects taxpayers to risks of multiple State taxation in violation of the Foreign Commerce Clause.[39]

If this Court should find merit in these contentions, in the event such cases come before this bench, it will be confronted with issues not presented by the case at bar. The Court may find it necessary to decide whether the *Moorman*

[37] *See, e.g., Container Corporation of America* v. *Franchise Tax Board,* Cal. Super. Ct. City and County of San Francisco, No. 673-492, unpublished opinion sustaining the assessment, Sept. 11, 1979; *Mobil Oil Corporation* v. *Franchise Tax Board,* now pending in the Cal. Super. Ct. City and County of San Francisco, No. 723-863.

[38] The apportionment formula is based on the premise that a dollar of wages, property or sales in each taxing jurisdiction will produce at least roughly the same amount of profit as in each of the other jurisdictions in which the income is derived.

Taxpayers contend that because wages are markedly lower in foreign countries than in the United States and the other factors vary significantly, and profitability is substantially higher in foreign countries than in the United States, the apportionment method misattributes foreign source income to the States.

[39] See note 38, *supra.*

case doctrine of non-intervention in the diverse methods of apportionment of taxable income should be extended to foreign source operating income; and whether, as taxpayers argue, the application by a State of the apportionment method to foreign source income conflicts with Congressional regulation of foreign commerce, including the general rejection by Congress under the Federal income tax law of the apportionment method and its prescription instead of separate accounting for determining United States source income, as distinguished from foreign source income. (*Ibid.*).

In the instant case there is no need to decide whether the *Moorman* principle is applicable to foreign source operating income, or whether separate accounting is required to be used by the States in taxing corporations deriving operating income from foreign commerce. Instead, the case at bar can be disposed of without passing on those questions by holding, as Mobil contends the Court should hold, that the avoidance of multiple taxation requires a restriction of the jurisdiction of the States to tax foreign source dividends of the character at issue to the recipient's commercial domicile or the business situs of the stock. Accordingly, such a decision by this Court that the Vermont tax violates the Foreign Commerce Clause would have no bearing on the taxation, apportionment or allocation of operating income derived from foreign sources; it would be relevant only to the treatment of non-operating income.

The most extreme spectre conjured up by *amici* is to be found in the brief filed by the County of Los Angeles. There it is suggested that Mobil's arguments, if upheld, would "cause large pleasure yachts owned by California residents, chartered to California residents, but stopping for 2 days in Vancouver, to escape California taxation

because of the 'power' of Canadian officials to levy taxes there." (P. 2). We are at an utter loss to understand how the County of Los Angeles has been able to persuade itself that Mobil's contentions have any bearing on the power of the State of California to impose property taxes (which we understand the county to be concerned with) on the pleasure yachts in question.

The case at bar presents its own problems, to which we have devoted our argument. The Court's observation in *International Harvester Co.* v. *Department of Treasury* (322 U.S. 340, 348 [1944]), that "It will be time to cross that bridge when we come to it", is the proper answer to each of the spectres sought to be raised in the instant case by the briefs *amici*.

VIII.

In the Silence of Congress, Apportionment of Foreign Source Dividends by All the States in Which the Recipient Corporation Is Taxable Would Be Neither Constitutional Nor an Acceptable Resolution of the Issue in This Case.

In Socal's brief *amicus*, it is asserted that counsel for Mobil, in testimony before a Senate Finance Subcommittee, supported the propriety of apportioning dividends received from corporations that are part of the unitary business. (Pp. 10-11). In that testimony, it was stated that:

> "the realistic and fiscally sound tax treatment of such an enterprise [a unitary manufacturer and its sales subsidiary] is to combine or consolidate the income of the parent and selling subsidiary for purposes of unitary apportionment. The dividend issue would then

disappear, since the dividends would be eliminated as an intercompany item." [40]

The testimony went on to state:

"If, however, neither the State nor the taxpayer exercises the option granted by the type of statute which it is assumed would be in force to utilize the combined or consolidated approach, or, if for one reason or another, the taxpayer does not qualify under the statutory provision for combination, the character of the dividend income on a separate parent company basis, nevertheless, does not, in my thinking, change; it is still operating income which ought to be apportioned in taxing the recipient." [41]

The Senate hearings related to bills pending before Congress to regulate State taxation of interstate commerce.[42] The recommendations referred to were made in that context, and were directed to the type of legislation which counsel believes that Congress ought to enact, and not to the power of the States to tax in the silence of Congress. The enactment of Federal legislation would create "a whole new ball game" and make possible solutions to the plaguing problems of State taxation of interstate and foreign commerce that are beyond the powers and province of this Court under the Constitution.

If Congress were to regulate State tax allocation and apportionment of income, including dividends derived from

[40] Testimony of Jerome R. Hellerstein, Hearings on State Taxation of Interstate Commerce, Subcommittee on State Taxation of Interstate Commerce, Senate Committee on Finance, p. 163 (93rd Cong., 1st Sess., Sept. 18, 1973).

[41] *Ibid.*

[42] The major bills being considered were S.1245, the Mathias-Ribicoff-Humphrey bill and S.2092, the Magnuson bill. *Id.* p. 4.

foreign commerce, the legislation could both broaden and restrict the existing State power of taxation of income from foreign commerce.[43] The legislation would undoubtedly require the States to apply uniform methods of allocation or apportionment, at least on a basis elective by the taxpayer.[44] And it is believed by counsel whose testimony has been cited that Congress can, by enacting such legislation, empower the States to include in the apportionable measures of their income taxes foreign source dividends received by a taxpayer from corporations that are part of its unitary business.[45] Such a statute would, doubtless,

[43] The broad powers of Congress to regulate State taxation affecting the commerce were affirmed in *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946). For a survey and analysis of the sweeping powers of Congress to regulate interstate commerce, see Stern, "The Commerce Clause and the National Economy: 1933-1946", 59 Harv.L.Rev. 883 (1946). *Cf.* also, the denial of review of a State court decision upholding P.L. 86-272, 73 Stat. 55, under which Congress restricted State taxation of interstate commerce. *International Shoe Co.* v. *Cocreham*, 246 La. 244, 164 So. 2d 314 (1964), cert. denied *sub nomine Mouton* v. *International Shoe Co.*, 379 U.S. 902 (1964).

[44] This has been true of all the major bills dealing with the area that have been before Congressional Committees in recent years. See §201, S. 1245 and §301, S. 2092, note 42 *supra*, and §301, S. 2173, 95th Cong., 1st Sess. 12 (Mathias bill), introduced Oct. 4, 1977.

[45] Although the question has not arisen, there is basis in the decisions of this Court for the view that the type of legislation under discussion would be within the power of Congress under Section 5 of the 14th Amendment, the Enabling Clause, coupled with the plenary power of Congress to regulate foreign commerce, regardless of whether there would have been adequate Due Process nexus between the taxing State and the dividend income in the absence of Congressional regulation. See *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) and the analysis of that case in L. Tribe, American Constitutional Law, §5-14 p. 265 *et seq.* (1978); and Professor Paul A. Freund's reference to the powers of Congress under both the Commerce Clause and the Enabling Clause of the 14th Amendment in discussing the possible establishment by Congress of an administrative commission that would take over the function of resolving State tax apportionment and allocation questions. "Umpiring the Federal System", 54 Columbia L.Rev. 561, 571 (1954).

likewise prohibit the State of a corporation's commercial domicile or of the business situs of the stock from allocating in full to its tax base foreign source dividends received from corporations that are part of the taxpayer's unitary business.[46] The result of such Congressional regulation would be that dividends derived from unitary corporations operating in foreign commerce would be subject to State taxation on an apportioned basis, under a uniform formula, by the various States in which the business operates, but that multiple taxation of the dividends would be eliminated.

Such a solution is not, however, possible by decision of this Court unaided by Congressional legislation. First, it is submitted that there is no warrant under the Due Process Clause or the Commerce Clause, so long as Congress remains silent, for this Court to deny to the State of a taxpayer's commercial domicile (or to the State of the business situs of the stock if the stock has acquired a situs outside the holder's commercial domicile), at which the stocks and the dividends they produce are managed and controlled, the power to allocate foreign source dividends *in toto* to its tax base. (See App. Br. Point II.E.). Second, *Moorman* made explicit the fact that this Court has neither the constitutional authority nor the institutional capacity to prescribe a national, uniform code of apportionment. (*Id.* at 37).[47] Consequently, a decision of this Court sustaining the Vermont dividend apportionment would exacerbate the risks of multiple taxation of dividends from foreign commerce, in view of (a) the resulting power of all the States in which a taxpayer does business to apportion the dividends and the concomitant power of the State of the taxpayer's commercial domicile or the business situs of the stock, to allocate the dividends, and (b) the wide diversity of State allocation and apportionment methods used by the various states. As Professor Paul A. Freund has observed:

> "The Court has the power to allow or disallow state taxes but not to alter or set terms, and the mesh of its net is consequently coarse." [48]

So long as Congress remains silent, there does, however, lie within the "mesh" of the Court's "net", the power to which the decisions under the Due Process Clause and the Commerce Clause, State taxing tradition and policy considerations all point, namely, that the power of the States to tax foreign source dividends (and to tax them in full) lies solely in the State of the taxpayer's commercial domicile, or the business situs of the stock if it has acquired a situs in another State.

[46] See §§207-208, S. 1245, §306, S. 2092, and §302, S. 2173, all note 44 *supra*.

[47] See, also, Black, Frankfurter and Douglas, J.J. dissenting in *McCarroll* v. *Dixie Greyhound Lines*, 309 U.S. 176, 188-189 (1940), *(Footnote continued)*

and Frankfurter, J. dissenting in *Northwestern States Portland Cement Co.* v. *Minnesota* and *T.V. Williams, as State Revenue Commissioner* v. *Stockham Valves and Fittings, Inc.*, 358 U.S. 450, 476 (1959).

[48] See *op. cit.* note 45 *supra*, 54 Columbia L.Rev. at 569.

CONCLUSION

In view of the foregoing and the reasons set forth in Appellant's Brief, the decree of the Vermont Supreme Court should be reversed, with directions to set aside the assessment to the extent that foreign source dividends have been included in the apportionable base of the tax at issue.

Dated: October 25, 1979

Respectfully submitted,

JEROME R. HELLERSTEIN
80 Pine Street
New York, New York 10005
(212) 344-1279

JOHN DWIGHT EVANS, JR.
150 East 42nd Street
New York, New York 10017
(212) 883-4965
Attorneys for Appellant

Of Counsel:

WILLIAM B. RANDOLPH
80 Pine Street
New York, New York 10005

APPENDIX

APPENDIX D

Analysis of Allocation and Apportionment of Dividends By States Whose Classification in Appendix B to Appellant's Brief Has Been Challenged.

California, Montana; Idaho, Kansas; Oregon and Colorado: The MTC asserts that "presumably all the dividends in question would be eliminated" in the States named because those States apply the combined method of apportionment to unitary businesses. MTC. Br. 72. However, no State treats as part of the unitary business a corporation in which the taxpayer holds less than 50% of the stock. Consequently, except in California which allocates all taxable dividends to the State of commercial domicile, the large amounts of dividends at issue that were received by Mobil from United States or foreign incorporated non-subsidiaries would be subject to the apportionment rules of the above mentioned States. See App. 76.

As for California, that State's regulations provide that most dividends are to be allocated to the taxpayer's commercial domicile; the only exception stated is the case of taxpayers whose principal business actually is dealing in securities; such dividends are apportioned. Reg. 25120, P-H Calif. ¶11,536-L.60. Counsel for the MTC has elsewhere recognized that California allocates dividends to the State of commercial domicile. See Dexter, "Taxation of Income from Intangibles of Multistate-Multinational Corporations", 29 Vand.L.Rev. 401, 416-418 (1976).

Standard Oil Company of California, whose commercial domicile is located in that State, is currently challenging the allocation to California of its dividend income, including foreign source dividends (see *Appeal of Standard Oil*

Co. of California, State Board of Equalization and Socal Br. at 2), contending that the dividends should be apportioned. It is for that reason the company has filed a brief *amicus* in the case at bar supporting the Commissioner's postion.

Mississippi: Contrary to counsel's assertion (MTC Br. 74), the Mississippi statute makes it clear that most dividends are allocable to the commercial domicile or business situs. "Business income derived from intangible property of any kind or nature shall be treated as income from sources within this state, if the evidence of ownership of such property has acquired a business, commercial or actual situs in this state. Business income derived from unitary multi-state activities which cannot be allocated to any state shall be apportioned to this state by use of formulas prescribed by the commissioner." Miss. Code Ann. §27-7-23(c)(2)(B)(ii), CCH Miss. ¶12-430. Moreover, the Mississippi regulation provides: "The income allocable to specific states shall include interest income, dividends, capital gains on the sale of property not used or employed in the unitary business, . . . or any other income wholly earned within some specific jurisdiction or jurisdictions." Reg. 1.27-7-23(7), CCH Miss. ¶12-435.

Arizona: That the table in Mobil's Appendix properly lists Arizona among the States allocating taxable dividends to the commercial domicile (or to the business situs), despite the MTC's assertion that this classification is erroneous (MTC Br. 72, 74), is shown by that State's regulations:

> "In the case of foreign corporations which have not acquired a commercial domicile within this State, income from intangible personal property is income from sources within this State only if the property has a business situs here.
>
> . . .
>
> Some examples of income which ordinarily is to be considered as nonapportionable are as follows: . . . (2) Interest on bonds, dividends on stock and other income from intangibles." Reg. §135-8(a), (b), CCH Ariz. ¶ 12-406.

Minnesota, Oklahoma and Louisiana: As to the three States named, whose classification as allocating all dividends to the commercial domicile has been challenged (MTC Br. 73-74), some refinements or qualifications with respect to the classification may be appropriate.

The Oklahoma statute provides that income from "interest, dividends" and other intangible property "shall be allocated" to the commercial domicile of the taxpayer or to the business situs of the property if the income is not part of a unitary business. Okla. Stat. Tit. 68, §2358A, CCH Okla. ¶ 12-425.

The Minnesota regulations provide that "The income from intangible personal property ordinarily follows the domicile of the recipient except where such property is employed in the business of the taxpayer and such business does not consist principally of the holding of such property and the collection of the income and gains therefrom." Reg. §2017(2)(b), CCH Minn. ¶ 12-408.

The Louisiana statute provides that dividends "shall be allocated to the state in which the securities . . . producing such income have their situs, which shall be at the business situs of such securities . . . if they have been so used in connection with the taxpayer's business as to acquire a business situs, or, in the absence of such a business situs, shall be . . . at the commercial domicile of the

taxpayer in the case of a corporation; provided that dividends upon stock having a situs in Louisiana received by a corporation from another corporation which is controlled by the former, through ownership of 50% or more of the voting stock of the latter, shall be allocated to the state or states in which is earned the income from which the dividends are paid, such allocation to be made in proportion to the respective amounts of such income earned in each state. . . ." La. Rev. St. §243, CCH La. ¶ 12-411.

North Carolina and South Carolina: The MTC asserts that the table erroneously classifies South Carolina as a State which allocates all dividends to the commercial domicile of the payee corporation (MTC Br. 72). That classification is correct, as is clear from the statute.

"The following items of income shall be specifically and directly allocated in accordance with the following provisions before apportionment of the remaining net income and such items shall not be included in any factor of the apportionment formula:

. . .

(2) Dividends received from corporate stocks owned, less all related expenses, shall be allocated to the state in which the principal place of business of a corporation is located. . . ." S.C. Code §12-7-1120, CCH S.C. ¶ 12-435.

The MTC brief assumes that North Carolina is treated in the table as allocating all income to the commercial domicile. MTC Br. at 74-75. That is erroneous; the State is classified in the table as allocating non-business dividends and apportioning business dividends.

Supreme Court, U.S.
FILED
AUG 27 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 78-1201

MOBIL OIL CORPORATION,

Appellant,

vs.

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

APPEAL FROM
THE SUPREME COURT OF VERMONT

BRIEF AMICUS CURIAE ON BEHALF OF THE COUNTY OF LOS ANGELES

JOHN H. LARSON
County Counsel

JAMES DEXTER CLARK
Deputy County Counsel

648 Hall of Administration
Los Angeles, California 90012
(213) 974-1833

Attorneys Amicus Curiae for the
COUNTY OF LOS ANGELES

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 78-1201

MOBIL OIL CORPORATION,

Appellant,

vs.

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

APPEAL FROM
THE SUPREME COURT OF VERMONT

BRIEF AMICUS CURIAE ON BEHALF OF THE COUNTY OF LOS ANGELES

JOHN H. LARSON
County Counsel

JAMES DEXTER CLARK
Deputy County Counsel

648 Hall of Administration
Los Angeles, California 90012
(213) 974-1833

Attorneys Amicus Curiae for the
COUNTY OF LOS ANGELES

TOPICAL INDEX

	Page
Table of Authorities	ii
INTEREST OF THIS AMICUS CURIAE	1
ARGUMENT	3
I. THE DUE PROCESS CLAUSE ARGUMENT PROPOSED BY APPELLANT FAILS TO ACCOUNT FOR THE DIFFERENCE IN TAXES	3
II. THE APPELLANT'S COMMERCE CLAUSE ARGUMENTS FAIL TO CONSIDER THE NATURE OF THE TAX AND THE NATURE OF THE COMMERCE CARRIED ON	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	Page
Hays v. Pacific Mail SS Line, 58 U.S. 546 (1855)	7
Japan Lines Ltd. v. County of Los Angeles, ___ U.S. ___, 47 U.S.L.W. 4477 (April 30, 1979)	5, 6, 7
Moorman Manuf. Co. v. Bair, 437 U.S. 267 (1978)	3
Norton Co. v. Department of Revenue, 340 U.S. 534 (1951)	1, 3, 4
Sea-Land Services Inc. v. County of Alameda, 12 Cal.3d 772, 117 Cal.Rptr. 448 (1974)	7
White Cloud Charter Boat Co. v. County, L.A. Superior Ct. No. C264361	2

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1979
No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

vs.

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

BRIEF AMICUS CURIAE ON BEHALF OF THE COUNTY OF LOS ANGELES

INTEREST OF THIS AMICUS CURIAE

The Appellant herein has suggested that the Due Process Clause presents the taxation of a company's income on the basis of Norton Co. v. Department of Revenue, 340 U.S. 534 (1951), (involving a tax based upon actual sales to the state's customers). The Appellant also suggests that because it receives some income

from abroad, that income is totally immune from consideration as part of the corporate income for state tax purposes. The arguments proposed in support of these conclusions would have the effect, if accepted, of preventing any consideration of foreign related matters in levying state or local taxes. The Appellant's arguments would cause large pleasure yachts owned by California residents, chartered to California residents, but stopping for 2 days in Vancouver, to escape California taxation because of the "power" of Canadian officials to levy taxes there. This would be true even though no tax had been levied or was contemplated in Canada.1/

Because of the novelty of the Appellant's approach, no estimate of revenue loss caused by this Court's acceptance of its theories can be made. But the loss of property tax income as a result of accepting Appellant's commerce clause arguments would be at least in the tens of millions of dollars per year in Los Angeles County alone.

1/ A similar state of facts is now being presented to the California Superior Court in White Cloud Charter Boat Co. v. County, L.A. Superior Ct. No. C264361. A taxpayer organized a corporation which charters principally to the taxpayer himself and which touches at foreign ports. The plaintiff utilizes the Appellant's arguments concerning the Commerce Clause in an attempt to avoid even apportioned taxation in California.

ARGUMENT

I

THE DUE PROCESS CLAUSE ARGUMENT PROPOSED BY APPELLANT FAILS TO ACCOUNT FOR THE DIFFERENCE IN TAXES.

The Appellant utilizes a case involving a sales-based tax and applies it to income taxes imposed by the Appellee (Norton Co. v. Department of Revenue, supra).

The Appellant suggests that a general-purpose tax, i.e., the income tax, should be subject to a rule that excludes from its ambit any transaction not related to the taxing jurisdiction.

But the argument misses the mark in that the apportionment itself narrows the taxable profits to those related to the jurisdiction.2/

2/ Appellant seeks to use this same "divide and conquer" approach to Moorman Manuf. Co. v. Bair, 437 U.S. 267 (1978). Appellant states that the power to tax must be separated from the power to apportion. But in reality, apportionment is one of many devices to prevent the states

(cont. p. 4)

In the sales-based tax arena the taxpayer would be required to show that the sales it seeks to avoid being taxed had no connection with the taxing jurisdiction (Norton Co. v. Department of Revenue, supra at p. 537).

The income tax, however, is not based upon any narrow effect upon the taxing jurisdiction, nor is it used for narrow tax-related purposes. It is based upon the effect of the business' presence upon the total economy of the taxing jurisdiction. As a result, an attempt to classify it in the same way as a tax based upon particular transactions, or upon the mere presence of property, does not comport with the nature of the tax in any way.

2/ (cont.)

from taxing that which they have no power to tax. Tax Credits and other devices are all actually part of the States' efforts to impose taxes only that "part" of a company having a connection with the jurisdiction. Apportioning company profits is part of the determination of a State's power to tax and cannot be separated from it.

In fact, if the Appellant's argument in this regard is accepted, it would be logical for a Court to consider the Due Process approach assuming that apportionment had been carried out so as to correctly reflect the taxpayer's presence in the jurisdiction. In fact, Appellant does not appear to dispute this.

Such comparisons result only in double deductions, requiring a State to apportion income so as to levy the tax only on that portion of income logically related to the jurisdiction, and also to break out and deduct some (or all) out-of-state activities, even though they were already apportioned. The Appellant has failed to consider the difference between a tax on some thing or transaction and one based upon the company's income, logically apportioned to the particular State.

The Appellant has also failed to show that the apportionment was not proper or accurate.

II
THE APPELLANT'S COMMERCE CLAUSE ARGUMENTS FAIL TO CONSIDER THE NATURE OF THE TAX AND THE NATURE OF THE COMMERCE CARRIED ON.

The Appellant suggests that, since some of its income is received from companies operating in other countries, such income should be immune from any taxation by the States.

The Appellant supports this suggestion with the theory that this Court's requirements for property taxes directly on instrumentality of commerce (which were not shown to have any broad impact on the State) should be applied in addition to apportionment concepts. (See Japan

Lines Ltd. v. County of Los Angeles, ___ U.S. ___, 47 U.S.L.W. 4477 (April 30, 1979)). This "per se" approach would simply immunize every dollar of income, every piece of property, and every sale having any contact with a foreign taxing jurisdiction.

The Appellant suggests that because a foreign nation could possibly impose a tax which would be contrary to every civilized nation's concept of fairness and propriety, all state taxes on a company touching those foreign nations are unconstitutional

This new approach to state taxation of multi-national companies is a new one, indeed, and should be examined carefully before being applied to taxes and situations which are not relevant.

Here, for instance, the Appellant seeks to immunize income from foreign countries simply because it came from foreign countries. There is no showing here that that income was not used or spent (or could not be used or spent) in Vermont. There is no showing that the income was not used or spent in another state rather than Vermont. And there is no showing that, if operation in Vermont reflected a temporary loss, the income would not be used to render support there.

The income tax is not based on the temporary presence of instrumentalities which are constantly in transit. Nor is it based upon a

single transaction having virtually no impact on the economy of a state. It is based upon the more or less pervasive impact of a company's activities in the jurisdiction. The idea that such a tax, (given that impact), is subject to the same rules as other taxes, simply ignores the nature of the tax and the fact that apportionment has been correctly carried out.[3/]

In reality, the Appellant seeks to apply tests meant to protect foreign enterprises only temporarily in a State (and whose instrumentalities are constantly in transit), from the problem involved in taxes which have been subject to varying court opinions (see e.g., Hays v. Pacific Mail SS Line, 58 U.S. 546 (1855) and Sea-Land Services Inc. v. County of Alameda, 12 Cal. 3d 772, 117 Cal.Rptr. 448 (1974)). Appellant seeks to apply those tests to a domestic company, permanently impacting on the total economy of a state in a variety of ways. The tests suggested by the Appellant are simply inapplicable and would have the effect of wholesale immunization

---

3/ In Japan Lines Ltd. v. County, supra, the foreign carrier attacked the apportionment method itself, as applied to in transit instrumentalities, which had only the most indirect impact on the economy of the State. Here, the Appellant does not attack the apportionment method, and one would assume that the apportionment correctly measures the "amount" of the company which is "in" the State of Vermont.

of income from state taxation even though the income was used to directly or indirectly support in-state operations.

CONCLUSION

The Appellant has attempted to:

1. Impose sales tax logic on income taxes;

2. Impose in-transit-property-tax logic on permanent establishments;[4/]

3. Impose rules relating to foreign-based companies on U.S.-based companies; and to

4. Impose all possible foreign tax systems on the tax systems of the States of the United States.

4/ One is obliged to ask whether the fact that a foreign country can impose a property tax on a building in this country belonging to a foreign bank, prevents a locality from taxing such a building. Appellant would, apparently answer in the affirmative.

No such attempts are supported by the United States Constitution or even the most far-fetched emotions of accomodation to our foreign trading partners.

Respectfully submitted,

JOHN H. LARSON
County Counsel

JAMES DEXTER CLARK
Deputy County Counsel

Attorneys Amicus Curiae
for the County of
Los Angeles

Supreme Court, U. S.
FILED
JUN 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION
Appellant,

v.

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

On Appeal from the Supreme Court of Vermont

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF APPELLANT

COMMITTEE ON STATE
TAXATION FOR THE
COUNCIL OF STATE
CHAMBERS OF COMMERCE

GEORGE S. KOCH
Counsel
449 South Capitol St. S.W.
Washington, D.C. 20003

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

INDEX

Page

INTRODUCTORY STATEMENT 1

INTEREST OF AMICUS CURIAE 2

QUESTIONS PRESENTED BY APPELLANT 2

ARGUMENT 3

A. The Tax On Appellant's Dividends Violates The Due Process Clause, Because There is no Connection Between Its Business, Property, or Operations in Vermont and the Dividends Taxed 3

B. The Inclusion in Part or in Whole of Dividends From Domestic and Foreign Subsidiaries in the Apportionable Base of the Tax Subjects the Corporation to a Risk of Multiple Taxation Prohibited by the Commerce Clause. 13

C. The Taxation of the Foreign Source Dividends on an Apportioned Basis is Invalid on the Grounds that it Frustrates Federal Policy in Regulating Foreign Commerce. 18

CONCLUSION 27

APPENDIX A 1A

Discrimination In Selectively Paralleling The Internal Revenue Code.

TABLE OF AUTHORITIES

CASES: Page

Chestnut Securities Company v. *Oklahoma Tax Commission*, 125 F. 2d 571 (10th Cir. 1942) *cert. denied*, 316 U.S. 668 (1942) 12

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 3, 6, 13

Connecticut General Life Insurance Co. v. *Johnson*, 303 U.S. 77 (1938) 9

Curry v. *McCanless*, 307 U.S. 357 (1939) 12

Evco, d.b.a. *Instructional Designs* v. *Jones*, 409 U.S. 91 (1972) 17

First Bank Stock Corporation v. *Minnesota*, 301 U.S. 234 (1937) 12

Freeman v. *Hewit*, 329 U.S. 249 (1946) 3

Frick v. *Pennsylvania*, 268 U.S. 473 (1925) 9

General Motors Corp. v. *Washington*, 377 U.S. 436 (1964) 17

Hans Rees' Sons, Inc. v. *North Carolina*, 283 U.S. 123 (1931) 9

Japan Line, Ltd. v. *County of Los Angeles*, 47 U.S.L.W. 4477 (1979) ..... *passim*

Michelin Tire Corporation v. *Wages*, 423 U.S. 276 (1976) 13

Miller Bros. Co. v. *Maryland*, 347 U.S. 340 (1954) 4

Moorman Manufacturing Company v. *Bair*, 437 U.S. 267 (1978) ..... *passim*

Norton Co. v. *Department of Revenue*, 340 U.S. 534 (1951) 6

St. Louis Cotton Compress Co. v. *State of Arkansas*, 260 U.S. 346 (1922) 10, 23

State Board of Insurance v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962) 10, 23

Underwood Typerwriter Co. v. *Chamberlain*, 254 U.S. 113 (1920) 9

Virginia Electric & Power Co. v. *Currie*, 254 N.C. 17, 118 S.E. 2d 155 (1961) 14

Washington Revenue Department v. *Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978) 16

Wheeling Steel Corporation v. *Fox*, 298 U.S. 193 (1936) 12

Wisconsin v. *J.C. Penney Co.*, 311 U.S. 435 (1940) 3

STATUTES:

Internal Revenue Code

§243 14

§§243-247 ..... 11, 25

§§901-902 11

22 U.S.C. §2351 18

50 U.S.C. App. §2402 20

CONSTITUTION:

Commerce Clause, United States Constitution Article I, Sec. 8, cl. 3 ..... *passim*

Due Process Clause, United States Constitution, Amendment XIV ..... *passim*

OTHER AUTHORITIES:

The Bureau of National Affairs, Inc., "Daily Tax Reports" No. 110 (June 6, 1979) at J10 22

National Foreign Trade Council, Inc., "The Case for 'Deferral'" (August, 1978) 15

Hearings, Subcommittee on State Taxation of Interstate Commerce of the Senate Committee on Finance, 93rd Cong. 1st Sess., p. 274 (1973) 16

Hearings, Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, 89th Cong. 2d Sess. Vol. 2, p. 1793 (1966) 16

Peters, "The Distinction Between Business Income and Nonbusiness Income," 1973 So. Calif. Tax Inst., pp. 266-7 15

Treasury Model Income Tax Treaty of May 17, 1977, Article 23 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION,
Appellant,

v.

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

On Appeal from the Supreme Court of Vermont

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF APPELLANT

I. INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of the Appellant in the above-captioned case. The consent of the Attorney for the Appellant and the Attorney for Appellee has been obtained. The letters of consent have been filed with the Clerk of this Court.

II. INTEREST OF AMICUS CURIAE

The motion of the Committee on State Taxation of the Council of State Chambers of Commerce (COST) for leave to file a brief as *Amicus Curiae* in support of Appellant's Jurisdictional Statement was granted by this Court on May 14, 1979. The motion which was granted and the brief as filed sets forth the interest of COST as *Amicus Curiae* and background of the problems involving state taxation of dividend.

III. QUESTIONS PRESENTED BY APPELLANT

Where a State imposes an income tax on a corporation that is engaged in foreign commerce and the corporation is neither organized under the laws of the taxing State nor maintains any commercial domicile in that State, and the apportionable base of the income tax includes dividends received by the corporation from foreign subsidiaries and domestic and foreign non-subsidiaries conducting all their business in foreign countries:

(1) Does the tax violate the Due Process Clause of the Fourteenth Amendment where the only connection between the corporation and the taxing State is the sale of products in that State?

(2) Does the inclusion of the foreign source dividends in the apportionable base of the tax subject the corporation to a risk of multiple taxation prohibited by the Commerce Clause?

(3) Is the taxation of the foreign source dividends on an apportioned basis invalid on the ground that it violates the Commerce Clause, frustrating Federal policy in regulating foreign commerce?

IV. ARGUMENT

A. The Tax On Appellant's Dividends Violates The Due Process Clause, Because There Is No Connection Between Its Business, Property, Or Operations In Vermont And The Dividends Taxed.

The Court in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 280-281 (1977), embraced the view expressed by Justice Rutledge in *Freeman* v. *Hewit*, 329 U.S. 249 (1946), that "... a state tax is unconstitutional only if the activity lacks the necessary connection with the taxing state to give "jurisdiction to tax,' ... or if the tax discriminates against interstate commerce, or if the activity is subject to multiple taxation", and voiced its approval of a practical analysis that would sustain a State tax on interstate commerce if it "... is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.*, at 279.

The line of decisions which articulate the analysis currently accepted by this Court has its origin in *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435 (1940). Therein, the Court expressed the conceptual underpinnings of its present day practical approach to constitutionality in the following words:

> For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has

> afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.
>
> . . . That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. (p. 444)

The most recent application of this analysis to a State tax imposed on income from operations in interstate commerce is found in *Moorman Manufacturing Company* v. *Bair*, 437 U.S. 267 (1978). Therein it is stated that the Due Process Clause places two restrictions on the power of the States to tax income: first, there must be some definite link between the income-generating activities and the taxing State; and second, the income sought to be taxed must be reasonably related to the activities in the State.

While both of these restrictions protect against the extraterritorial extension of a State's taxing power they are not synonymous. The first requirement necessitates a showing that the person charged with the tax conducted activities in the State which gave rise, wholly or in part, to the income to which the tax applied. This restriction runs to the jurisdiction of the State over the subject; *i.e.*, income taxed, rather than over the person liable therefor. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (1954). The decisions of this Court have consistently established that Due Process requires an initial showing that some part of the activities giving rise to the specific income being taxed occurred in the taxing State.

In the case before this Court, Vermont is seeking to tax the dividend income derived by Mobil from the ownership and management of capital stocks of a large number of domestic and foreign corporations (J.S., p.5).[1] Thus, the initial test imposed by the Due Process Clause requires that Vermont show that Mobil's instate activities included some exercise of its ownership or management over its stock holdings. The facts in the instant case not only fail to establish the existence of this condition but, indeed, show the converse. Mobil exercised ownership, control and management over its stock holdings in the State of New York, not Vermont. (*IBID.*) The immediate event which gave rise to the dividend income; *i.e.*, the receipt of the dividends, occurred in New York, not Vermont. (*IBID.*) Mobil's activities in Vermont were directed solely toward the realization of income from the wholesale and retail marketing of petroleum and related products. (J.S., p.4) It had no oil or gas production or refinery facilities in Vermont. (J.S., p.5) Further, the stipulated facts fail to show any connection between the operating income derived from the limited Vermont activities and the dividend income realized by Mobil from its New York stock management activities. In addition, the payor corporations conducted no business, maintained no offices, had no employees, owned or leased no property, and derived no income from sources within the State of Vermont having derived all, or all but an insignificant portion, of their income from sources outside the United States. (*IBID.*)

---

[1] The term "domestic" corporation refers to a corporation organized under the laws of one of the States, and "foreign" corporation to a corporation organized under the laws of a foreign country.

To hold that the vital link between Mobil's activities in Vermont and the dividend income realized by Mobil in New York can be presumed from the fact that Mobil engaged in the marketing and distribution of products in Vermont would constitute a marked departure from past decisions of this Court. *Norton Co.* v. *Department of Revenue*, 340 U.S. 534 (1951). The sole issue here is the power of Vermont to tax the dividend income of a corporation neither organized under the laws of Vermont nor maintaining any commercial domicile in that State. This issue merely requires an examination of the dividend process for its resolution. In the present case, dividends flow, in part, in foreign commerce—from the domicile of the foreign payors to appellants' commercial domicile in New York, and, in part, in interstate commerce—from the domicile of the domestic payors to Mobil's domicile in New York. In neither case is there any contact with the State of Vermont. COST respectfully submits that Vermont's efforts to tax such dividend income do not meet the test, under either the Due Process Clause of the 14th Amendment or the Commerce Clause of the Constitution, which this Court has reaffirmed for a permissable State tax burden on either interstate or foreign commerce. *Complete Auto Transit Inc. v. Brady, supra; Moorman Mfg. Co. v. Bair, supra; Japan Lines, Ltd. v. County of Los Angeles*, 47 U.S. L.W. 4477 (1979). Under these decisions, there clearly is an impermissible overreaching of jurisdictional boundaries and burden placed on commerce by Vermont for there is neither a Vermont nexus over the dividend income nor does Vermont give anything with respect to the dividend income in question for which it can ask return—it has afforded no protection, conferred no benefits nor granted any opportunities

with respect to the realization, payment or receipt of the dividends.

The second Due Process restriction on a State's power to tax income; *i.e.*, the requirement that there be a reasonable relationship between the income sought to be taxed and the taxpayer's activities in the taxing State, does not arise until the first requirement, the jurisdictional link, has been found to exist. Since there is no jurisdictional link between Mobil's dividend income and the State of Vermont, the decisions of this Court relative to the limitations on State action generated by the second Due Process restriction are not applicable. This second restriction addresses what is essentially a measurement problem. When there is a jurisdictional link with the specific income which a State seeks to tax and that link is not exclusive, Due Process requires that the quantum of the income taxed bear some rational relationship to the activities which provide the jurisdictional link; otherwise, the exercise of taxing authority by one State could interfere with a like right of sister States. When several States have a link to the same income; *e.g.*, income from interrelated operations conducted in more than one State, the Due Process Clause requires at least the use of rough measuring devices to reconcile the valid jurisdictional claims of each State. However, when, as in the instant case, there is no activity linking Mobil's Vermont operations with Mobil's dividend income, measurement is not an issue. It takes nothing to measure nothing.

The State of Vermont places much reliance on this Court's recent decision in *Moorman Manufacturing Company* v. *Bair, supra.* (J.S.App. C, pp. 24a, 26a, 29a) This dependence is misplaced. Unlike the instant

case, Iowa's jurisdiction to tax the particular income considered had been conceced in *Moorman*. The net income Iowa sought to measure and tax was operating income, resulting from selling and warehousing carried on in the State, and determined by netting expenses against receipts from the sale of goods occurring in a specified period during which Moorman conducted its intrastate and interstate business. Since the earning of such net income is not a *discrete taxable event*, and since Moorman's accounting records did not show the net income specifically derived from its activities in Iowa, the State was unable to ascertain the exact source of income. The State, therefore, relied on an apportionment formula to approximate the net income attributable to Moorman's activities in Iowa. In *Moorman*, Iowa did not include the taxpayeres dividend income in the apportionable income base (437 U.S. at 260). The only controversy in *Moorman*, then, was whether the formula produced a sufficient approximation of the net income earned in Iowa to be legally acceptable.

In the present case, unlike *Moorman*, the extraterritorial taxation which occurs is *not* caused by formulary imprecision, but rather by lack of jurisdiction over Mobil's holding of stock on which the dividends were paid, over its receipt of dividends, and over its management and control of investments—incurable defects no matter what the formula.

Vermont's assertion of a right to tax unrelated dividend income is particularly pernicious since, if it is granted, Vermont would be permitted to tax the dividend income without recognizing either the New York activity of Mobil or the payor activity in other States and nations in its apportionment formula. To

confirm Vermont's taxation of Mobil's dividend income would: (i) grant similar authority to every State in which Mobil conducts like activities; (ii) allow all States to determine the portion of such dividend income subject to taxation without regard to the competing claims of other States; and (iii) insofar as dividend income is concerned, abandon the long-standing Constitutional doctrine that a State cannot tax income which is "in no just sense attributable to transactions within its jurisdiction". *Hans Rees', Inc.* v. *North Carolina*, 283 U.S. 123, 134 (1931). See *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (1920). Dividends would become a particularly unattractive form of income, because of their unique vulnerability to taxation everywhere without regard to either of the established Due Process tests. This result is not required since the amount of the income which Vermont seeks to tax is fixed at the moment of the discrete taxable event (*i.e.*, the receipt of the dividend)—an event which in this case took place in New York, not Vermont.

This court has seen through state tax policies such as that proposed by Vermont in this case and has stricken them down, as in *Frick* v. *Pennsylvania*, 268 U.S. 473, 489 (1925):

> While a state may shape its tax laws as to reach every object which is under its jurisdiction, it cannot give them extraterritorial operation.

See also *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U.S. 77 (1938).

These cases clearly indicate that such an imprecise apportionment formula as approved in *Moorman* can measure an existing link or relationship required by

the Due Process Clause; however, the application of such formulas does not create the definite link which must be found to exist before apportionment may be applied. The means cannot be the sole justification for their implementation. The Due Process Clause requires more than jurisdiction over the person (*i.e.*, individual or corporation) required to pay the tax; it also requires nexus between the income which is the subject of the tax and the activities or property in the taxing State.

St. Louis Cotton Compress Company v. *State of Arkansas*, 260 U.S. 346 (1922), and *State Board of Insurance* v. *Todd Shipyards Corporation*, 370 U.S. 451 (1962), establish that the jurisdiction of a State over activities that transpire within its borders *ends* with that border and cannot be used in such a way as to modify legitimate activities that occur outside its boundaries. In those cases, this Court examined Arkansas and Texas laws designed to create tax advantage for those insuring instate property with insurers licensed in the State. This the Court would not allow, concluding in *Cotton Compress* at 349:

> It is true that the state may regulate the activities of nondomiciliary corporations operating within the state but it cannot regulate or interfere with what they do outside.

If Due Process considerations preclude the States of Texas and Arkansas from framing their tax laws to discourage use of insurers not licensed in those respective States, how can the same Clause permit Vermont to levy an income tax whose effect is to discourage investment in foreign as opposed to domestic corporations by imposing a tax on an apportionable, taxable income, base which in general included 100%

of the dividends received from foreign corporations while allowing the dividends received deduction, in determining such base, for dividends from qualified domestic corporations?[2]

Over the nearly 111 years since the adoption of the Fourteenth Amendment to the Constitution, the decisions of this Court relative to the scope of the Due Process Clause have fostered the belief of persons and States that dividend income is subject to taxation outside the State in which the recipient has a legal or commercial domicile only if the owner of the dividends chooses to hold and manage such property in another State. Consistent with this position on the law, seven states now provide for the taxation of all dividend income received by corporations domiciled therein (J.S.App.F, p.39a). If this Court should now see fit to change this position by holding that Vermont can subject part of Mobil's dividends to taxation, the Court will be faced with the necessity of adjudicating the conflicting claims of these seven States and States which seek to follow the path of Vermont (*IBID*) or, in the alternative, create a new significant impediment to the formation of sorely needed investment capital by imposing thereon compounding State tax burdens. Such a policy would discourage new U.S.

---

[2] Vermont law selectively parallels provisions of the U.S. Internal Revenue Code; *i.e.*, allows dividends received deduction (I.R.C. §§243-247), includes foreign source dividends in gross income (I.R.C. §61) and ignores the foreign tax credit concept (I.R.C. §§901-904). (J.S. p.5 footnote4) This policy clearly works a discrimination against foreign as opposed to domestic dividends which is inconsistent with the proper exercise of State jurisdiction and would, in addition, appear to work a discrimination under the Equal Protection Clause of the U.S. Constitution. For further amplification of this discriminatory effect refer to argument C. herein and see Appendix A.

investment in equity capital, deprive this nation of the fruits of capital formation, erode private employment opportunities and leave U.S. citizens alone among modern industrial nations in their inability to make full use of the corporate form for the organization of national and international businesses. Matched against these consequences, the claim of Vermont to tax dividend income which admittedly accrued from activities outside its boudaries represents the elevation of a State's parochial desire for revenue (J.S.App.C, p.28a) above a paramount concern of our Federal Union.

The jurisdictional right to levy taxes on dividends should be restricted to the State of commercial domicile, under the Constitutional doctrine—which remains applicable to intangibles—that movables follow the person. Dividends are "localized at the owner's domicile for purposes of taxation" if they do not have a "business situs" in another State. *Wheeling Steel Corporation* v. *Fox*, 298 U.S. 193 (1936); *First Bank Stock Corporation* v. *Minnesota*, 301 U.S. 234 (1937); *Curry* v. *McCanless*, 307 U.S. 357 (1939); *Chestnut Securities Company* v. *Oklahoma Tax Commission*, 125 F.2d 571 (10th Cir. 1942) *cert. denied*, 316 U.S. 668 (1942).

B. The Inclusion In Part Or In Whole Of Dividends[3] From Domestic And Foreign Subsidiaries In The Apportionable Base Of The Tax Subjects The Corporation To A Risk Of Multiple Taxation Prohibited By The Commerce Clause.

For state taxes on foreign commerce, the Court in *Japan Line, Ltd.* v. *County of Los Angeles*, 47 U.S.L.W. 4477 (1979), mandated two further tests to those set forth in *Complete Auto Transit, supra:* first, whether the tax, notwithstanding apportionment, poses a substantial risk of multiple taxation; and second, whether the tax prevents the Federal Government from (quoting *Michelin Tire Corporation* v. *Wages*, 423 U.S. 276, 285) "speaking with one voice when regulating commercial relations with foreign governments." In *Japan Line*, this Court struck down a property tax applied to cargo containers, owned by a Japanese firm and used in foreign commerce, which were temporarily present in California. Although *Japan Line* involved property taxes, there is nothing unique to taxes on tangible property that would limit the controlling principles of the case to such a narrow target. They should be held equally applicable here.

Whether or not the Vermont tax satisfied the Commerce Clause tests fixed by *Complete Auto Transit*,—the fairness of an apportionment scheme that principally consists of factors totally unrelated to the dividend income being taxed is, at best, questionable,

[3] More than 99% of the dividends at issue were received by Mobil from domestic and foreign corporations deriving all, or all but an insignificant portion, of their incomes from sources outside of the United States.

Virginia Electric & Power Co. v. *Currie,* 254 N.C. 17, 118 S.E.2d 155 (1961)—it clearly offends the additional tests related to multiple taxation and impairment of Federal sovereignty set forth in *Japan Line.*

The Vermont tax creates more than a risk of compound taxation of dividends paid out of incomes from sources outside of the United States; rather, it compounds taxation in fact. The operating income of foreign and domestic corporations derived in foreign countries is first subject to the taxes of the host foreign countries, thus reducing the amount available to be paid out as dividends. The dividends declared by the foreign corporations and the foreign source earnings of domestic corporations are also subjected to, or are susceptible to, a tax by the host foreign countries when paid to Mobil or the domestic corporations in which Mobil has stock holdings, respectively. Both of these taxes are entirely outside U.S. control. The dividends received directly by Mobil from foreign corporations and the foreign source earnings of domestic corporations in which Mobil holds stock may be further depleted by Federal income taxes when the cumulative effective foreign income tax rate is less than the U.S. tax rate. (With respect to dividends Mobil receives from domestic corporations operating outside the U.S., multiple corporate taxation is avoided in part, at the Federal level, by operation of L.R.C. §243 which permits Mobil to exclude 85% of such dividends.) This is a legitimate exercise of U.S. national policy adopted by Congress against the background of clear knowledge of the taxing authority exercised by foreign countries.[4] If this court approves the Vermont tax, the dividends received by Mobil from foreign source earnings will be subjected to still another wave of State taxation.

[4] "Since 1913, when the U.S. income tax was established, a corporation and its shareholders have been taxed separately. The corporation is taxed on its earnings and the shareholder is taxed when and if the corporation pays a dividend. The same principle applies when the corporation is organized under the laws of a foreign country or parent, or controlling shareholder is a U.S. company. The income of the foreign subsidiary is not taxable to the parent corporation unless and until the subsidiary pays a dividend to the parent. The principle, whereby earnings of overseas subsidiaries are not taxed until remitted to the U.S. parent, is popularly but incorrectly referred to as 'deferral,' whereas in fact, there can be no 'deferral' because under U.S. tax law a taxpayer is not taxed on income until it is received. The main exception in the U.S. tax law to this general rule is in Subpart F of the Internal Revenue Code, pursuant to which U.S. shareholders are taxed currently on the income of a controlled foreign corporation when the nature of the corporation and its sources of passive income indicate that tax avoidance was sought.

The U.S. system for taxing U.S. parents of foreign subsidiaries conforms to the internationally accepted system of taxing income derived from foreign trade and investment. This system recognizes that the primary right to tax income earned abroad rests with the host country. Some industrialized countries do not tax foreign source income at all. Others, including the United States, tax income of foreign subsidiaries only when remitted to the parent, and double taxation of foreign-source income is avoided by means of the allowance of the foreign tax credit.

The present system of taxing U.S. parent companies on the earnings of foreign subsidiaries serves to achieve the national objectives of restoring a more favorable balance of trade, stimulating growth in domestic employment and increasing the competitive position of foreign operating entities in marketing U.S. products and services overseas." National Foreign Trade Council, Inc., "The Case for "Deferral' ", pp. 12-13, (August, 1978).

[5] Peters, "The Distinction Between Income and Nonbusiness Income," 1973 So. Calif. Tax Inst., pp.266-267.

the leave of this Court, all States in which the corporate recipient of the dividends does business will have the right collectively to tax the entire dividends received from foreign sources, a right already exercised by the foreign countries in which the dividends were earned and by the U.S. Federal government. The compounding of tax burdens which would be permitted would exist despite any action by Congress or this Court to rationalize conflicting State claims through the adoption of uniform allocation and apportionment criteria.[6] This Court explained in *Japan Line* at 4480-4481:

> In order to prevent multiple taxation of interstate commerce, this court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full-value. The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality in full. . . . Yet neither this court nor this nation can insure full apportionment when one of the taxing entities is a foreign sovereign. . . . Hence, whereas the fact of apportionment in interstate commerce means that "multiple burdens logically cannot occur," *Washington Revenue Department* v. *Association of Washington Stevedoring Co.*, 435 U.S. 734, 746-747, the same conclusion as to foreign commerce, logically cannot be drawn.

[6] "If taxation of dividend income received by one corporation from another is not of itself an impediment to interstate commerce, it is difficult to understand upon what basis of national interest a state in which a corporate taxpayer maintains its commercial domicile may be forbidden to tax all of the dividend income received by that corporation." Hearings Before the Subcommittee on State Taxation of Interstate Commerce of the Senate Committee on Finance, 93d Cong., 1st Sess., p. 274 (1973). Also see Hearings Before the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, 89th Cong., 2d Sess., Vol. 2, p. 1793 (1966).

Thus, the multiple taxation of which Mobil complains occurs not from overlapping State apportionment formulas (J.S.App.C, p.26a) but from the compounding of tax after tax on the same foreign source income. *Moorman, supra,* does not govern the Commerce Clause issue in this case. Nothing could more discourage investment in the stock of foreign corporations than subjecting the dividend income therefrom to State income taxes of the type imposed by Vermont which gives no credit for the taxes previously imposed by the host foreign countries on the earnings out of which the dividends were paid or for the taxes imposed on the dividends by such host countries when paid to U.S. corporate shareholders. See Appendix A. (Vermont also does not allow the foreign tax credit to a domestic corporation operating outside the U.S. for the host foreign country's tax on foreign source earnings or for the tax on such earnings when remitted to the corporation in the U.S.)

In the past, this Court has not been reluctant to deny a State the right to tax income when to permit such taxations would give rise to multiple taxation. In *Evco, d.b.a. Instructional Designs* v. *Jones,* 409 U.S. 91 (1972), this Court declared a tax imposed on receipts from sales having a destination outside the taxing State to be constitutionally invalid because of the threat of multiple taxation. In so doing, it gave preference to the market State with respect to gross receipts taxes. See *General Motors Corp.* v. *Washington,* 377 U.S. 436 (1964). In the opinion of this Court, the market State has the greater claim when gross receipts taxes are in issue. By the same line of rea-

soning, the State in which the corporation receiving dividend income has its commercial domicile has the greater claim to the taxation of such dividend income, and other States should be denied the right to tax this income. Accordingly, if any of the dividend income of Mobil is to be subjected by decision in this case to tax by the separate States, only the State of Mobil's commercial domicile should be permitted to impose such a tax.

C. The Taxation Of The Foreign Source Dividends On An Apportioned Basis Is Invalid On The Ground That It Frustrates Federal Policy In Regulating Foreign Commerce.

As this Court noted in *Japan Line, supra,* foreign commerce is preeminently a matter of national concern, an area where Federal uniformity is essential. As this Court said, the Framers of the Constitution determined that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments." Direct investments by U.S. corporations affect all fields of national and international trade. To a significant extent, the economic health of the United States depends upon the health of direct investments made in foreign countries by American corporations."[7]

[7] "Receipts to the United States from U.S. direct investment abroad amounted to $16.5 billion in 1977, including interest, dividends, fees, royalties and earnings of unincorporated affiliates. An offset of $5 billion representing net capital outflows for new direct investment abroad resulted in an $11.5 billion contribution to the U.S. balance of payments by our foreign direct investments last year.

The declared policy of the United States to encourage foreign trade and foreign investment by U.S. corporations is clearly reflected in various statutes and treaties, among them the *Foreign Assistance Act of 1961,* 22 U.S.C. §2351 which provides:

> (a) The Congress of the United States recognizes the vital role of free enterprise in achieving rising levels of production and standards of living essential to economic progress and development. *Accordingly, it is declared to be the policy of the United States to . . . encourage the contribution of United States enterprise toward economic strength of less developed friendly countries, through private trade and investment abroad.*
>
> (b) In order to encourage and facilitate participation by private enterprise to the maximum extent practicable in achieving any of the purposes of this chapter, the President shall:
>
> * * *
>
> (2) Accelerate a program of negotiating treaties for commerce and trade, including tax treaties, which shall *include provisions to encourage and facilitate the flow of private investment to, and its equitable treatment in, friendly countries and areas participating in programs under this chapter.*

Cumulatively from 1968 through 1977, the total returns on U.S. direct investment abroad amounted to some $104 billion, while the net capital outflows during the same period amounted to $39 billion, producing a positive contribution to the balance of payments of about $65 billion over this ten-year period, or an average of $6.5 billion per year. Clearly, our stake in international business is substantial and in turn the growth and strehgth of the American economy is significantly dependent on the growth of our overseas business." National Foreign Trade Council, Inc., "The Case for 'Deferral' ", p. 7 (August, 1978).

The Federal Government also evidenced its control over the areas of international trade in the *Export Administration Act of 1969*, 50U.S.C. App. §2402 which states:

> It is the policy of the United States . . . to encourage trade with all countries with which we have diplomatic or trading relations.
>
> It is the policy of the United States to use export controls to the extent necessary to further significantly the foreign policy of the United States.

Clearly, the United States Government has made the policy determination that U.S. direct foreign investment *is in the best interest* of the United States, and it considered the policy so important as to declare it by statute.

This Federal policy encouraging free foreign commerce is advanced by eliminating the onus of multiple taxation when the U. S. enters into tax treaties with foreign countries. In this regard U.S. income tax treaties were recently discussed by Donald C. Lubick, Assistant Treasury Secretary for Tax Policy, in his statement before the Senate Foreign Relations Committee on June 6, 1979. Preceding his discussion of Income Tax Conventions with Korea and with Hungary, an Estate and Gift Tax Convention with France and two Protocols amending, respectively, the proposed Income Tax Convention with the United Kingdom and the existing Income Tax Convention with France. Mr. Lubick stated:

> "Before discussing these Protocols and Conventions I would like to briefly highlight the Development of the U.S. tax convention program since the Treasury last appeared before this Committee on the subject of tax conventions in July of 1977. Since that time, we have continued to work to expand and improve the U.S. tax convention network. In the last two years, we have been engaged in discussions with twenty-six countries * and have had preliminary communications with several others. This represents an increase in the level of our activity on tax conventions which is attributable to several factors.

> *First, our experience during this period has been that more U.S. taxpayers are becoming aware of the value and importance of tax conventions—both as vehicles for confirming and clarifying the rules of taxation which apply to economic transactions between the two contracting states and as a means of facilitating the harmonization of different tax systems in order to resolve conflicts and to avoid double taxation. Both of these functions of a tax convention help to simplify the business decision-making process.*
>
> * * *
>
> . . . Moreover, developing countries seem more aware that an income tax convention with the United States *signals a positive attitude toward U.S. investment and, as such, may help to stimulate such investment.*
>
> * * *
>
> A tax convention is negotiated on behalf of the United States by representatives of the Treasury in consultation with the Department of State. Typically, our counterparts in a negotiation are representatives of the foreign tax administration. The public does not particpate in the actual government-to-government discussion. However, we have undertaken to keep the public aware of our scheduled negotiations and to provide the public with information about the positions we might be taking in particular negotiations. . . .

* * *

. . . When possible, we also try to indicate where it may be necessary to deviate from the United States' preferred negotiating position which is embodied in the U.S. Model Income Tax Convention which itself has been in the public domain since 1975. The U.S. Model, which was last revised in May of 1977, is similar, in many respects, to the Model Income Tax Convention published by the Organization for Economic Cooperation and Development. The United States also published a Model Estate and Gift Tax Convention on March 16, 1977. The United States is the only country which publishes its model tax conventions.

* * *

Finally, this increased activity can be attributed, in part, to changes in the tax law of either the United States or the foreign jurisdictions. Several of the Conventions and Protocals you are considering today were prompted by such changes.

* * *

The Protocal to the existing Income Tax Convention with France is also an example of a revision that is needed because of a change in foreign law. Effective *January 1, 1979, France will have a new tax law that significantly changes the French income tax liability of U.S. persons who reside in France. The Protocol is necessary to relieve the double taxation that will result when the new French law comes into effect.*" (Emphasis added; footnote omitted.) The Bureau of National Affairs, Inc., "Daily Tax Reports" No. 110 at J10, (June 6, 1979).

Multiple Taxation is avoided, generally, by the country hosting a shareholder granting credits for income taxes paid to foreign governments, by out-

right exemption of dividends from tax, or taxation of such income at substantially reduced rates. The United States, for example, as a matter of policy grants credits for income tax paid or deemed paid by U.S. shareholders to foreign governments with respect to foreign source income such as dividends (I.R.C. §§901-904). Similar provisions are contained in Article 23, Treasury Model Income Tax Treaty of May 17, 1977.[8]

---

[8] 1. In the case of the United States, double taxation shall be avoided as follows: In accordance with the provisions and subject to the limitations of the laws of the United States (as it may be amended from time to time without changing the general principle hereof), the United States shall allow to a resident or citizen of the United States as a credit against the United States tax on income or capital the appropriate amount of tax paid to .....; and, in the case of a United States company owning at least 10 percent of the voting stock of a company which is a resident of ..... from which it receives dividends in any taxable year, the United States shall allow as a credit against the United States tax on income the appropriate amount of tax paid to ..... by that company with respect to the profits out of which such dividends are paid. Such appropriate amount shall be based upon the amount of tax paid to ....., but the credit shall not exceed the limitations (for the purpose of limiting the credit to the United States tax on income from sources outside of the United States) provided by United States law for the taxable year. For purposes of applying the United States credit in relation to tax paid to ..... the taxes referred to in paragraphs 2(b) and 3 of Article 2 (Taxes Covered) shall be considered to be income taxes.

2. In the case of ....., double taxation shall be avoided as follows: In accordance with the provisions and subject to the limitations of the law of ..... (as it may be amended from time to time without changing the general principle hereof), the ..... shall allow to a resident or citizen of ..... as a credit against the ..... tax on income or capital the appropriate amount of tax paid to the United States; and in the case of a ..... company owning at least 10 percent of the voting stock of a company which is a resident of the United States from which it receives dividends in

Vermont has chosen to selectively follow the I.R.C.[9] and in so doing derogates from the I.R.C. provisions (§§901-904) related to dividens from foreign sources and foreign source earnings of domestic corporations,

---

any taxable year. ..... shall allow as a credit against the United States tax on income the appropriate amount of tax paid to the United States by that company with respect to the profits out of which such dividends are paid. Such appropriate amount shall be based upon the amount of tax paid to the United States, but the credit shall not exceed the limitations (for the purpose of limiting the credit to the ..... tax on income from sources outside of .....) prdvided by law for the taxable year. For purposes of applying the credit in relation to tax paid to the United States the taxes referred to in paragraphs 2(a) and 3 of Article 2 (Taxes Covered) shall be considered to be income taxes.

3. For the purposes of the preceding paragraphs of this Article, the source of income or profits shall be determined in accordance with the following rules:

(a) Dividends, as defined in paragraph 3 of Article 10 (Dividends) *shall be deemed to arise in a Contracting State if paid by a company which is a resident of that State* or if paragraph 5(c) of Article 10 (Dividends) applies.

(b) Interest, as defined in paragraph 2 of Article 11 (Interest), shall be deemed to arise in the State specified in paragraph 4 of Article 11.

(c) Royalties, as defined in paragraph 2 of Article 12 (Royalties), shall be deemed to arise in a Contracting State to the extent that such royalties are with respect to the use of, or the right to use, rights or property within that State.

(d) Except for income or profits referred to in subparagraphs (a), (b), or (c), and except for income or profits taxed by the United States solely by reason of citizenship in accordance with paragraph 2 of Article 1 (Personal Scope): *income or profits derived by a resident of a Contracting State which may be taxed in the other Contracting State in accordance with this Convention shall be deemed to arise in that other Contracting State.* (Emphasis added) Treasury Department's Model Income Tax Treaty of May 17, 1977, Article 23, Relief from Double Taxation.

[9] See Appendix A.

since it grants no credit for taxes paid or deemed paid to foreign governments. While penalizing the receipt of dividends from foreign subsidiary corporations and domestic corporations operating principally outside the U.S., Vermont would: (i) create a clear and present danger of multiple taxation of foreign source dividends and foreign source earnings of domestic corporations; and (ii) create a preference for dividends received from domestic subsidiary corporations and certain foreign corporations if 50% or more of their gross income from all sources is effectively connected with U.S. operations by allowing dividend received deductions. (I.R.C. §§243-247). See *St. Louis Cotton Compress Company* v. *State of Arkansas, supra,* and *State Board of Insurance* v. *Todd Shipyards Corporation, supra.*

Approval of the Vermont tax policies by this Court, would be to condone multiple tax burdens depleting domestic corporate investment capitol arising out of foreign operations and manifest a preference for investment capital arising out of U.S. operations, despite Federal policies to the contrary. As a result, the Nation as a whole would suffer. As this Court stated in *Japan Line, supra,* as 4482:

> If other states followed the taxing state's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this nation from speaking with one voice in regulating foreing comerce.

The economic consequences of the policy which Vermont seeks to pursue with respect to dividends received by domestic corporations having foreign investments, if duplicated by other States, could force domestic corporations to choose between:

(1) continuing business activites in their present form, suffering the depletion of repatriated foreign source earnings by multiple taxation before investment of such funds in the U.S. or elsewhere; or

(2) giving up the repatriation of the earnings of foreign corporations and vesting control of direct and indirect foreign investments in a foreign corporation to permit returns on investments to be recycled back into foreign corporations insulated from taxation by the various States in which U.S. operations are conducted.

The implications, albeit arguendo, of forcing such choices on U.S. corporations as they strive to compete in world markets are real, and following logically from sanctioning multiple income taxes and taxes which penalize U.S. companies for investments in foreign subsidiaries or for operating outside the U.S. To approve such State action, particularly when the United States is experiencing severe trade deficits, would place de facto control over foreign commercial policy in the several States and make decisions at the Federal level on this vital matter subservient to the day-to-day State revenue concerns.

CONCLUSION

For these reasons COST respectfully submits that the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States are violated by Vermont's imposition of a tax on dividend income from domestic and foreign corporations.

Respectfully submitted,

George S. Koch
Attorney for the Committee on State Taxation of the Council of State Chambers of Commerce

APPENDIX

APPENDIX A

Discrimination In Selectively Paralleling The Internal Revenue Code

The Vermont income tax law contains essentially the same definition of taxable income as the Internal Revenue Code. Vt. Stat. Ann., Title 32, §5811(18). (J.S.App.E, p.35a). Thus, items of income exempt under Federal law from State income tax are excluded from the Vermont tax base.

Under the Internal Revenue Code, a domestic corporation must include in gross income all items of income that are not specifically excluded therefrom by statute. This includes income from both sources within the United States and sources without the United States, as well as dividends from both domestic and foreign corporations. Foreign corporations are subject to tax in general only on income from sources within the United States. Except to the extent of the limited exclusion provided by I.R.C. §116, dividends paid by a domestic corporation to its individual shareholders are includable in their gross income.

In the case of a domestic corporation owning stock in another corporation, if the Internal Revenue Code did not prevent the unabated application of the foregoing rules, there could result three substantial Federal income taxes on the business income earned by the latter corporation: one on the corporation earning the business income, a second on the corporation receiving a dividend from the corporation earning the business income, and a third on the individual shareholders receiving a dividend. The Internal Revenue Code contains several provisions which are designed, in general, to prevent the imposition of multiple corporate income taxes in such cases. The policy underlying these provisions is that there should be only one significant Federal corporate income tax on the business income of a corporation and that no substantial, additional

Federal income tax should attach to that income until distributed as dividends to the individuals who indirectly own the stock of the corporation. See 2 Surrey, Warren, McDaniel and Ault, Federal Income Taxation—Cases and Materials 286-87 (1973); Bittker & Eustice, Federal Income Taxation of Corporations and Shareholders ¶5.06, at 5-18, 5-19 (3d ed. 1971).

The foregoing policy is implemented by I.R.C. §§243-247, I.R.C. §243 provides generally that a domestic corporation may deduct an amount equal to 85% of the dividends it receives from another domestic corporation. As a result, the payee corporation is subject to tax only on 15% of the amount of the dividend received. Under the present corporate tax rate structure, this results in a maximum Federal income tax of 6.9% of the dividends.

In the case of dividends received by a domestic corporation from another domestic corporation, at least 80% of the voting stock of which is owned by the payee corporation, the deduction allowable under I.R.C. §243 is equal to 100% of the amount of the dividend received. As a result, in such cases no Federal income tax is imposed on the payee on the receipt of such a dividend. Where this degree of stock ownership is present, I.R.C. §§1501-1504 permit the corporate group to file a consolidated Federal income tax return, in which case dividends paid by one member to another are eliminated. Treas. Reg. §1.1502-1504 permit the corporate group tp file a consolidated Federal income tax return, in which case dividends paid by one member to another are eliminated. Treas. Reg. §1.1502-14(a)(1).

The foregoing rules are also applicable to dividends received by a foreign corporation that is engaged in trade or business in the United States if the dividends are effectively connected with the trade or business.

As a general matter, no such deduction is allowable to a domestic corporation under the Internal Revenue Code with respect to a dividend from a foreign corporation. How-

ever, I.R.C. §245 provides a dividend received deduction of 85% or 100% with respect to dividends paid by certain foreign corporations subject to Federal income tax on their income from engaging in trade or business in the United States * In the case of foreign corporations operating abroad, double taxation of the business income of the payor corporation is avoided by means of the foreign tax credit. In this respect, I.R.C. §902 permits the payee corporation to take as a credit an appropriate portion of the foreign income tax of the payor if the payee owns at least 10% of the voting stock of the payor. As a result, even though such a dividend is included fully in the Federal income tax base, no Federal income tax is imposed on the payee if the foreign tax rate equals or exceeds the Federal income tax rate.

It is manifest that these rules relating to intercorporate dividends operate—albeit differently—in the context of the Federal tax system to ensure that the Federal and foreign corporate tax burden on business earnings of a corporation whose stock is not owned directly by individuals is not excessive by reason of the earnings being subject to multiple taxation. This is true whether the corporation is domestic or foreign and whether its business is conducted in the United States or abroad.

---

* Under I.R.C. §245(a), if a foreign corporation has been engaged in a trade or business in the United States for an uninterrupted period of 36 months (or, if shorter, for its entire existence) and if the proportion of its total gross income during that period which is effectively connected with that trade or business is at least 50%, that proportion of a dividend paid by the foreign corporation qualifies for the 85% or 100% dividends received deduction. Under I.R.C. §245(b), if all of the stock of a foreign corporation is owned by a domestic corporation and if all of the gross income of the foreign corporation is effectively connected with the conduct of a trade or business in the United States, a dividend paid by the foreign corporation qualifies for the 100% dividends received deduction.

It is equally clear, however, that these rules in the context of the Vermont tax system result in a Vermont tax burden on dividends from foreign corporations operating abroad (the entire amount of which is included in the Vermont tax base without allowing any credit for foreign taxes) greatly exceeding the Vermont tax burden on dividends from domestic corporations or form foreign corporations operating in the United States (no more than 15% of which is included in the Vermont tax base). Allowing a foreign tax credit would, in some cases, eliminate this discrimination but would not where little or no foreign tax is imposed. Accordingly, wholly apart from the question whether Vermont may take into account dividends from corporations having no connection with Vermont, the Vermont tax system discriminates against investment in foreign corporations by domestic corporations and to that extent imposes a burden on foreign commerce that does not apply to domestic commerce. Thus the selective paralleling of the I.R.C., albeit administratively convenient, would appear to create classifications of taxpayers which violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

Supreme Court, U. S.
FILED
JUN 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION,
Appellant,

v.

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

On Appeal From the Supreme Court of Vermont

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

BY THOMAS J. HOUSER
General Counsel

WILLIAM E. BLASIER
Associate General Counsel

JAN S. AMUNDSON
Assistant General Counsel

1776 F Street, N.W.
Washington, D.C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION,
Appellant,

v.

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

On Appeal From the Supreme Court of Vermont

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*, IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE

With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the Appellant.

The National Association of Manufacturers (NAM) is incorporated under the laws of the State of New

York as a non-profit voluntary business association. The NAM represents approximately 12,000 members engaged in manufacturing and related businesses, whose employees comprise an estimated 78% of the nation's manufacturing work force. Many member firms receive foreign source income from foreign subsidiaries and operations.

This case presents to the Court for the first time, a challenge to the inclusion of specific foreign source dividends in the tax base for corporate income taxes. Appellant, Mobil Oil Corporation (Mobil), is not, however, challenging the theory of apportionment employed by Vermont, or its authority to tax the Appellant's intrastate or interstate activities, merely, the inclusion of foreign dividends. Many NAM members located in the forty-six states which have a corporate income tax, have interests similar to Appellant, and are concerned about the adverse impact of the inclusion of unrelated foreign source dividend income in the apportionable tax base for state income tax purposes. Constitutional mandates and recent Supreme Court decisions clearly favor Appellant's contentions. Due to the NAM's diverse membership base, we believe our filing a brief as *amicus curiae* offers a broad view of the significant issues raised in this appeal.

ARGUMENT

Due Process and Commerce Clause Considerations Prohibit Multiple Taxation and Favor Allocation of Unrelated Foreign Source Income

In 1970, 1971, and 1972, Appellant, Mobil, was engaged in interstate and foreign commerce. Mobil's activity in Vermont was limited to the wholesale and retail sale of petroleum products. Mobil paid Vermont

corporate income tax based on a three-factor formula. However, Mobil excluded from the tax base foreign source dividend income. In fact, Appellant does not challenge the State's authority to apportion the corporate income tax nor the formula employed by Vermont. The issue concerns the inclusion in the tax base of monies received as dividends from foreign subsidiary sources.

The power to regulate commerce is vested in the Congress as provided in Art. I § 8, Cl. 3 of the United States Constitution, "The Congress shall have power . . . to regulate commerce with foreign Nations and among the several States, and with the Indian Tribes." This is an area of national concern and the determinations of Congress pursuant to the Commerce Clause should not be menaced by inappropriate state actions. "The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control." *National Bellas Hess Inc.* v. *Department of Revenue,* 386 U.S. 753, 760 (1967).

Implicit in the regulation of interstate and foreign commerce is the prohibition against multiple taxation. The test of this prohibition lies in the potential for multiple taxation and not the fact that certain aspects of commerce are subject to multiple taxation.[1] Preferably, the basis for taxation of foreign source income lies in the allocation of certain funds to the jurisdiction with the constitutionally required nexus or link. The state of commercial domicile is the logical juris-

---

[1] *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250 (1938); *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U.S. 33 (1940).

diction. This is the situs where any benefits or services are offered to bring the monies under their taxing authority. It has long been recognized that the power of a state to tax requires some connection with the object of the tax. In *Miller Brothers Company* v. *Maryland,* 347 U.S. 340, 344 (1954), the Court refers to the "consistent adherence to one time honored concept: that due process requires some definite link, some minimal connection, between a state and the person, property, or transaction it seeks to tax." Use of the allocation theory is consistent with the concepts of due process and tax policy. Using the allocation approach, which is applied in some manner in twenty-six jurisdictions, the state which offers some benefit to the company may exercise its authority to tax.[2] In the instant case, Appellant, without inclusion of the dividends, is paying to Vermont its apportioned amount of tax dollars reasonably connected with any and all benefits or services which inured to Mobil by virtue of their wholesale and retail activities in Vermont. The foreign dividends bear no relationship to the State. The decision should not rest on whether the state of commercial domicile, in this instance New York, taxes the funds. It is their ability to tax coupled with the constitutional mandates supporting a sufficient nexus, which renders this jurisdiction as the appropriate taxing authority.

What portion, if any, of such funds are taxed by the allocable state is dependent upon their internal tax policy and should be free from self-serving interpretations of sister states which could result in unwarranted inclusion of these funds in their apportionment tax base. Further, this is not an impediment to national foreign commerce policy. Once foreign source income is received in the state of commercial domicile there is a basis for taxation due to benefits accruing to the company engaged in business in that state. Absent this link to these funds, only upon a showing that the foreign subsidiaries avail themselves of benefits from the other state, could a possible argument be based. No such showing has been made by Vermont.

[2] *Chestnut Securities Co.* v. *Oklahoma Tax Commission,* 125 F.2d 571 (C.A. 10th 1942), *cert. denied,* 316 U.S. 668 (1942).

Moorman v. Bair Does Not Resolve The Issue of What Funds Comprise the Tax Base For Apportionment

Moorman Manufacturing Co. v. *Bair,* 437 U.S. 267 (1978) which deals with the Iowa apportionment formula is not dispositive of the issues in this appeal. The issue in *Moorman* was the use of a single factor formula rather than the three factor formula used in Vermont. The Court declined to interfere with the Iowa apportionment formula. However, the formula, not the monies included in the formula, was the crux of that case. Thus, as Appellant is not challenging the basic formula, the *Moorman* case does not resolve the issue present in this appeal.

The *Moorman* opinion refers to potential multiple taxation due to the variance in state apportionment formulas. However, the distinguishing characteristic is that the potential for multiple taxation derives from various states' apportionment formulas of the funds brought within their jurisdiction by domestic interstate commerce. The tax does not fall upon foreign monies such as these which bear no relationship to the interstate activity Mobil carries on in Vermont. Any argument favoring the taxability of foreign source dividend income based upon the *Moorman* rationale is erroneous. The threat of multiple taxation referred to

is solely upon apportioned monies admittedly includable in the state formula. The opinion does not address the issue of what funds are includable in the formula, such as foreign source dividends.

The *Japan Line* Standards On the Risk of Multiple Taxation and the Impairment of Federal Uniformity In Foreign Commerce Are Violated By the Vermont Decision

The most recent articulation by this Court of foreign commerce considerations is *Japan Line, Ltd.* v. *County of Los Angeles,* —— U.S. ——, 47 U.S.L.W. 4477 (May 1, 1979). In this case the county levied a property tax on cargo containers of Japan Line which were owned by the company and subject to tax in Japan. The California Supreme Court upheld the ad valorem property tax which this Court conclusively reversed. The issues presented clearly align with the issues in the instant case. Generally stated, the issue is whether the subject property used exclusively in international commerce, although owned and operated by a foreign company, can be used in an apportioned ad valorem property tax by a state. This is analogous to this case. Although the dividends at issue are not tangible working assets of international commerce, they are the product of international commerce. The dividends were from foreign operating subsidiaries of the Appellant and were in no way connected to their domestic operations. In *Japan Line* the Court recognizes the need to scrupulously ascertain the propriety of a tax which taxes foreign rather than interstate commerce. Hence, the inquiry will be the same whether it pertains to cargo containers or dividends.

The Court recognizes that two considerations must be resolved before sanctioning taxation of foreign commerce. "The first is the enhanced risk of multiple taxation. It is commonplace of constitutional jurisprudence that multiple taxation may well be offensive to the Commerce Clause." (47 U.S.L.W. 447 at 4480). Secondly, the state tax must be valued against the federal foreign commerce policy, which being of national concern, may necessitate a uniform approach. As stated in *Board of Trustees* v. *U.S.,* 289 U.S. 48, 59 (1933), "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."

In resolving these issues it is essential that no greater deference be given to foreign companies engaged in international commerce and subjected to their domestic taxation than to domestic companies engaged in foreign commerce and their consequential tax ramifications to the federal government and various states. The federal government's interest in a unified approach to foreign commerce should not be frustrated by the interference of certain aspects of state taxation, particularly when the question of the taxing nexus or link is tenuous or lacking. "If other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this Nation from 'speaking with one voice' in regulating foreign commerce." (47 U.S.L.W. 447 at 4482). Future potential for the stimulation of foreign commerce so essential to our economic stability would be hampered should states find foreign source dividend income a reservoir of revenue without meeting constitutional nexus standards and in complete disregard of the overall national policy.

This argument supports allocation of any such funds to the state of commercial domicile. In a policy argument, the overview of foreign commerce requires minimal interference by the states. Thus, the appropriate taxing authority is the state of commercial domicile, where all the incidents of control and investment are determined. The posture of national foreign commerce policy could be frustrated by constant attention to state claims for tax revenue from those companies engaged in interstate and foreign commerce, the latter having potentially no link to the taxing state. The logical extension of *Japan Line* would demand no less.

Of paramount importance in the *Japan Line* case is the distinction drawn between that case and *Moorman,* (*supra* p. 5). The opinion in essence confines the decision in *Moorman* to domestic income. "*Moorman,* finally, concerned interstate commerce. This case concerns foreign commerce. Even a slight overlapping of tax—a problem that might be determined *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." (47 U.S.L.W. 4477 at 4483).

Special Foreign Income Aspects Prohibit States From Taxing Unrelated Foreign Source Income

In *Japan Lines,* this Court required a more extensive inquiry for matters relating to foreign commerce than that applicable to domestic commerce. In regard to state taxes, a court must inquire ". . . whether the tax prevents the Federal government from 'speaking with one voice when regulating commercial relations with foreign governments.' " State policies which prevent the federal government from "speaking with one voice" are unconstitutional under the Commerce Clause, (47 U.S.L.W. 4477 at 4482).

The dividend income at issue here is the fruit of Appellant's activities overseas and within the State of New York. If Vermont is allowed to apportion to itself these dividends, there is nothing to prevent every state from apportioning foreign source income from any U.S. multinational which has some minor unrelated activity within the taxing state.

This result would run counter to federal policies to encourage U.S. investment abroad and the repatriation of earnings to U.S. shareholders. While taxes are only one of a number of considerations in the decision to invest or repatriate earnings, taxes remain a powerful influence. If Vermont is allowed to tax these earnings, no U.S. investor could reasonably know the extent of his state tax liability. A potential result would be a chilling of new U.S. investment overseas, both with respect to current and future projects. Whether this disincentive to investment would bring about some form of retaliation is speculative, but it is the *risk* of such retaliation that was held to be unconstitutionally repugnant in *Japan Lines* (47 U.S.L.W. 4477 at 4482).

A related problem is found with respect to the repatriation of earnings. The U.S. is not speaking with one voice to the foreign subsidiaries of U.S. companies, since no taxpayer can reasonably anticipate the tax consequences of repatriation of earnings. Under these circumstances, there may be an altered rate of repatriation until the issues are resolved with some certainty. In view of the federal intent in this area, such a result would be both undesirable and unconstitutional.

CONCLUSION

It is respectfully submitted that this case has presented issues crucial to the orderly flow of interstate and foreign commerce and has proven that to affirm the Vermont Supreme Court decision results in multiple taxation repugnant to the Constitution. Recent Court decisions substantiate these contentions. Based on the foregoing arguments we respectfully request that the decision be reversed.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

By THOMAS J. HOUSER
General Counsel

WILLIAM E. BLASIER
Associate General Counsel

JAN S. AMUNDSON
Assistant General Counsel

1776 F Street, N.W.
Washington, D.C. 20006

Supreme Court, U. S.
FILED
AUG 17 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE
UNITED STATES
OCTOBER TERM, 1979

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—VS.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

On Appeal From the Supreme Court of Vermont

BRIEF OF MULTISTATE TAX COMMISSION AND PARTICIPATING STATES AS AMICUS CURIAE ON BEHALF OF APPELLEE

WILLIAM D. DEXTER
General Counsel
Multistate Tax Commission
926-24th Way S.W.
Olympia, WA 98502
(206) 943-8320

STATE PRINTING PLANT OLYMPIA, WASHINGTON

PARTICIPATING AMICUS CURIAE

State of Colorado
J. D. MacFarlane
Attorney General
1525 Sherman Street
Denver, CO 80203

State of Oregon
James Redden
Attorney General
Department of Justice
100 State Office Bldg.
Salem, OR 97310

State of New Mexico
Jeff Bingaman
Attorney General
Bataan Bldg.
P.O. Box 1508
Sante Fe, NM 87501

State of Connecticut
Carl R. Ajello
Attorney General
30 Trinity Street
Hartford, CT 06115

State of North Dakota
Albert R. Hausauer
Special Assistant Attorney General
P.O. Box 485
Bismark, ND 58501

State of Arkansas
R. L. Qualls
Director, Arkansas Dept. of
Finance & Administration
Jack East, III
Acting Chief Counsel
P.O. Box 272
Little Rock, AR 72203

State of Utah
Robert B. Hanen
Attorney General
236 State Capitol
Salt Lake City, UT 84132

State of Idaho
David H. Leroy
Attorney General
Theodore V. Spangler, Jr.
Deputy Attorney General
State House
Boise, ID 83701

State of Nebraska
Paul L. Douglas
Attorney General
State Capitol
Lincoln, NE 68509

Commonwealth of Pennsylvania
Edward G. Biester, Jr.
Attorney General
Howard A. Cohen
Secretary of Revenue
Strawberry Square
Harrisburg, PA 17127

State of Montana
Mike Greely
Attorney General
Capitol Station 1
Helena, MT 95601

State of Minnesota
Warren R. Spannaus
Attorney General
102 St. Capitol
St. Paul, MN 55155

State of Delaware
Richard Gebelein
Attorney General
Department of Justice
State Office Bldg.
820 N. French St.
Wilmington, DE 19801

State of Kansas
Mickael Lennen
Secretary of Revenue
Alan F. Alderson
Chief Counsel
State Office Bldg.
Topeka, KS 66625

State of Alaska
Avrum M. Gross
Attorney General
Department of Law
Pouch K
State Capitol
Juneau, AK 99811

State of Alabama
William J. Baxley
Attorney General
State Administrative Bldg.
Montgomery, AL 36130

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1979

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—VS.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

On Appeal From the Supreme Court of Vermont

BRIEF OF MULTISTATE TAX COMMISSION AND PARTICIPATING STATES AS AMICUS CURIAE ON BEHALF OF APPELLEE

WILLIAM D. DEXTER
General Counsel
Multistate Tax Commission
926–24th Way S.W.
Olympia, WA 98502
(206) 943-8320

TABLE OF CONTENTS

	Page
INTRODUCTORY STATEMENT	1
STATEMENT OF INTEREST	2
COUNTERSTATEMENT OF QUESTIONS INVOLVED	8
STATEMENT OF THE CASE	9
A. HISTORY OF PROCEEDINGS	9
B. ANALYSIS OF THE FACTUAL RECORD	18
SUMMARY OF ARGUMENT	28
ARGUMENT	36
I. It is readily apparent that Mobil's due process argument is frivolous inasmuch as Mobil has failed to prove that the Vermont apportionment formula as applied to its federal taxable income does not reasonably measure its income it derived from its business operations in Vermont or that the dividends in question and the income derived therefrom were disassociated from its unitary business which it conducted both within and without Vermont, and inasmuch as Vermont can take into consideration out-of-state properties, activities and income in arriving at a reasonable apportionment of the unitary income of a trade or business.	36
II. The Vermont apportionment formula as applied to Mobil's federal taxable income is valid under the commerce clause of the constitution of the United States since it does not subject Mobil to any unconstitutional multiple taxation.	48

A. Introductory Considerations 48

B. Japan Line Ltd. v. County of Los Angeles, 47 U.S. L.W. 4477 (April 30, 1979) refutes, rather than supports, Mobil's "foreign source" argument inasmuch as this Court therein affirmed the principle of full apportionment to prevent any unconstitutional multiple taxation of domestic corporations engaged in interstate commerce. 53

C. If a state tax is fairly apportioned to reach only income reasonably attributable to the taxing state, the multiple taxation limitations of the commerce clause are satisfied. 55

D. In conformity with the dual purposes of the commerce clause to require interstate commerce to pay its way and to prevent discriminatory taxation of interstate and foreign commerce, the commerce clause has been properly interpreted by this Court to preclude only undue multiple state taxation in fact. 64

E. There is no merit to Mobil and its amicus curiae's argument that so-called "risks of multiple taxation" of dividend income is reduced by substituting the "commercial domicile" fiction in place of the existing income attribution rules. 70

Page

F. There is no valid political, economic or business or precedential validity to the argument of Mobil and its amicus curiae that the commerce clause of the United States should be interpreted to permit only the state of the taxpayer's "commercial domicile" to tax dividends or any other intangible properties under the facts and circumstances of this case. 75

1. Moorman and cases of like import control the disposition of this case inasmuch as there is here involved only the question of the constitutionality of the reasonable income tax attribution rules of the Vermont corporate income tax as applied to the unitary income of a unitary business conducted in part in the State of Vermont.. 76

2. Fiscal policy considerations, as well as history, do not support exclusive taxation of dividend income and other intangibles for state income tax purposes by the commercial domicile but rather supports apportionment of dividends and other intangibles to the extent that such intangible properties and the income derived therefrom constitute integral parts of the integrated, unitary business of the taxpayer which is conducted in part in the taxing state. 78

3. The history and the judicial decisions do not support taxation of dividends only by the state of commercial domicile, but rather, support the inclusion of dividends in apportionable income for state income

Page

attribution purposes if the stocks and the income derived therefrom are acquired and managed as an integral part of the taxpayer's unitary business which it conducted in part in the taxing state. 87

4. Decisions of this Court do not support exclusion of so-called "foreign source" dividends from apportionable income for income attribution purposes. 90

G. The inclusion of "federal taxable income" in apportionable income for Vermont income tax purposes does not conflict with any federal policy in regulating foreign commerce because it does not constitute the regulation of or taxation of foreign commerce and because there otherwise exists no federal policy with which it is in conflict. 91

CONCLUSION 94

TABLE OF AUTHORITIES

TABLE OF CASES *Page*

Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 (1896), rehearing 166 U.S. 185 (1897) .....28, 29, 40, 41, 42 Various
Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) 58
Albany International Corp. v. Halperin, 388 A.2d 901 (Me. 1978) 39, 90
Appeal of Texaco, Inc. (Calif. State Bd. of Equal. decision of January 11, 1978; CCH Cal. Rpts ¶ 205-821) 20
Appeal of W.J. Voit Rubber Co., May, 1947 C.C.H. Cal. Tax Rep. ¶ 202-435 90
ASARCO v. Mont. Dept. of Revenue, 567 P.2d 901 (Mont. 1977).....90
Bass, Ratcliff & Gretton Ltd. v. New York Tax Commission, 266 U.S. 271 at 282 (1924) 29, 44, 45, 55, 58
Brady v. John Hancock Mutual Life Insurance Company, 434 U.S. 804 (1977), dismissed the appeal of 342 S.2d 295 (1977).....57
Butler Bros. v. McColgan, 315 U.S. 501 (1942) 29, 34, 37, 46
Champion International Corp. v. Bureau of Revenue, 88 N.M. 411, 54 P2d 1300 (1975)..... 90
Cleveland Cliffs Iron Co. v. Corp. & Sec. Com., 351 Mich. 652, 88 N.W.2d 564 (1968).....90
Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917) ..49
First Bank Stock Corp. v. Minnesota, 301 U.S. 234 (1937) 81
First Federal S & L v. Massachusetts Tax Comm'n, 437 U.S. 255 at 262 (1977) 30, 57
Flint v. Stone Tracy Co., 220 U.S. 107 at 166 ....29, 43, 44
Ford Motor Co. v. Beauchamp, 308 U.S. 331 at 336 (1939) 29, 43, 44
General Motors v. Washington, 377 U.S. 436 (1964) .59, 65

Page

General Trading Co. v. State Tax Comm., 322 U.S. 335 (1944) 61
Great Lakes Pipeline Co. v. Commissioner of Taxation, 272 Minn. 403, 138 N.W.2d 612 (1965) 73, 89
Gulf Oil Corporation v. Morrison, 120 Vt. 324, 141 A.2d 671 (1958) 16
Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931) 30
In Re Goodyear Tire & Rubber Company, Corporate Income Tax 1966, 1967, 1968, 335 A.2d 310 (Vt. 1975) 16, 51, 90
In the Matter of the Appeal of Standard Oil Company of California, Calif. Bd. of Equal. (pending appeal) .72
International Harvester Co. v. Dept. of Treasury, 322 U.S. 340 at 348 (1944) 30, 61, 89
Japan Line Ltd. v. County of Los Angeles, ___ U.S. ___ (decided April 30, 1979) ..... 30, 32, 53 Various
John Deere Plow Co. v. Franchise Tax Board, 38 Cal.2d 214, 238 P.2d 569 (1951), appeal dismissed for want of a substantial federal question, 343 U.S. 939 (1952) 47
Johns-Manville Products Corp. v. Comr. of Rev. Admin., 115 N.H. 428, 343 A.2d 221 (1975) 90
Marshall-Wells Co. v. Commissioner of Taxation, 220 Minn. 458, 20 N.W.2d 92 (1945) 73
Maxwell v. Kent-Coffey Mfg. Co., 204 N.C. 265, 168 S.E. 397 (1933), aff'd 291 U.S. 642 (1934) 75, 90
McGoldrick v. Gulf Oil Corp. 309 U.S. 414 (1940) 93
McLeod v. Dilworth Co., 322 U.S. 327 (1944) 61
Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157 (1954) 58
Moline Properties, Inc. v. Commissioner, 319 U.S. 436 (1943) 51
Montgomery Ward & Co. v. Commissioner of Taxation, 276 Minn. 479, 151 N.W.2d 294 (1967) 73, 89

Page

Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) ..... 28, 30, 33, 38, 50, 56, 77 Various
N.Y. ex rel. Cohn v. Graves, 300 U.S. 308 at 312 (1936) 29, 50
National Leather Co. v. Massachusetts, 277 U.S. 413 (1927) 29
Norfolk & Western Ry Co. v. North Carolina, 297 U.S. 682 (1968) 30
Northwestern Airlines v. Minnesota, 322 U.S. 292 at 294 (1944) 30
Northwestern States Portland Cement Co., 358 U.S. 450 at 448, 449 (1959) 30, 36, 58, 65
Norton Co. v. Department of Revenue, 340 U.S. 534, 537 (1951) 18
Peck & Co. v. Lowe, 247 U.S. 165 (1918) 29, 49
Qualls v. Montgomery Ward, Sup. Ct. of Ark., dec'd July 2, 1979 90
Sperry & Hutchinson Co. v. Department of Revenue, 279 Or. 329, 527 P.2d 729 (1974) 90
Standard Pressed Steel Co. v. Dept. of Revenue, 419 U.S. 506 (1975) 30, 60
Times Mirror Company v. Franchise Tax Bd., Los Angeles Superior Court No. C1723731 72
U.S. Steel, et al. v. Multistate Tax Commission, et al., 434 U.S. 452 (1978), affirming 417 F. Supp. 795 (S.D.N.Y. 1976) 2, 29, 47
Underwood Typewriter Co. v. Chamberlain, 245 U.S. 113 (1920) 29, 45
Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936) 80
Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) 89
Woolworth Co. v. Director, Division of Taxation, 45 N.J. 466, 213 A.2d 1 (1965) 16, 89
Woolworth v. Commissioner of Taxes, 130 Vt. 544, 298 A.2d 839 (1972) 16, 89

STATUTES

Page

Ariz. Rev. Stat. § 43-135(g), P.H. State Income Tax Reporter, ¶ 12, 738.22 74
Internal Revenue Code § 243 92
Louisiana Rev. Stat. Ann. § 243 73
Minn. Stat. § 290.17 (P.H. State Income Tax Reporter, Minnesota ¶ 94-06 and ¶ 94-067a) 73
Miss. Law, § 27-7-23 as amended by Ch. 475, Laws of 1978 (P.H. State Income Tax Reporter, Mississippi § 92-532) 74
N.C. Gen. Stat. § 105-130.4(1) and (5) 74
N.C. Gen. Stat. § 105-130.4(i) 75
N.C. Gen. Stat. § 105-130.4(f) 75
Okla. Stat. Tit. 68, § 2348A (P.H. State Income Tax Reporter, Oklahoma § 12,711) 74
Uniform Laws Annotated, Vol. 9a, p. 448 et seq. (UDITPA) ..... 3, 5 Various
§ 5811(18) Vermont Statues Annotated 9
§ 5831 Vermont Statutes Annotated 9
§ 5833 Vermont Statutes Annotated 9
§ 5833(b) Vermont Statutes Annotated 10

MISCELLANEOUS

Ariz. Reg. § 135-8(b) (P.H. State Income Tax Reporter, Ariz. ¶ 11,289.55) 74
Corrigan, "Interstate Corporate Income Taxation—Recent Revolutions and a Modern Response," 29 Vand. L. Rev. 423 (1976) 7
Dexter, "Taxation of Income From Intangibles of Multistate-Multinational Corporations," 29 Vand. L. Rev. 401 (1976) 7, 82-85
Eleventh Annual Report of the Multistate Tax Commission (1977-78) 3
Hellerstein, "Recent Developments in State Tax Apportionment and the Circumscription of Unitary Business," XXI National Tax Journal 487, 496 40

MISCELLANEOUS—Continued

Page

Hellerstein, "State Taxation Under the Commerce Clause: An Historical Perspective," 29 Vand. L. Rev. 335, 347 ..... 71, 86
Mississippi Reg. 1.27-7-23(7) 74
Moody's Industrial Manual, p. 117 (1972) 20
Ninth Annual Report, Multistate Tax Commission (1975-1976) 2
Note, "Multinational Corporations and Income Allocation Under Sec. 42 of the Internal Revenue Code," 89 Har. L. Rev. 1202 (1976) 20
Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary House of Representatives, Vol. 1: H.R. No. 1480, 88th Cong. 2nd Sess. (1964) 68, 87-88
Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary House of Representatives, Volume 4, Part VI—Recommendations: H.R. No. 952, 89th Cong. 1st Sess., September 2, 1965, pp. 1135, 1144, 1155 ..... 88, 95
Results of a Survey on the Uniformity of State Laws by the State of Indiana, Feb. 15, 1977 3
Tax Notes, Sept. 1 and Oct. 20, 1975 69

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1979

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—VS.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

On Appeal From the Supreme Court of Vermont

BRIEF OF MULTISTATE TAX COMMISSION AND PARTICIPATING STATES AS AMICUS CURIAE ON BEHALF OF APPELLEE

INTRODUCTORY STATEMENT

This brief is submitted by the Multistate Tax Commission and the states which have joined in this brief as amicus curiae in support of the appellee. Both parties to this proceeding have consented to the filing of this brief.[1]

---

[1]Originals of the letter received from the parties, evidencing this consent, have been filed with the Clerk of the Court.

STATEMENT OF INTEREST

The Multistate Tax Commission (hereinafter referred to as the "MTC") is the administrative agency of the Multistate Tax Compact entered into currently by 19 states as full members and by 12 states as associate members.[2]

The purposes of the Compact are to:

1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatibility in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and other phases of tax administration.

4. Avoid duplicate taxation.[3]

The MTC seeks uniformity in state tax treatment of multistate-multinational businesses, and fairness and equity between such businesses and smaller in-state businesses. It is also working to advance effective enforcement of state corporate tax laws, and seeks policies which are simple and comprehensible for public officials and business taxpayers alike.

In fulfillment of these objectives in the area of state income taxation of multistate-multinational businesses,

[2]The current regular members are the states of Alasks, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The associate members are the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania, Tennessee, and West Virginia. (Ninth Annual Report, Multistate Tax Commission, June 30, 1976.)

[3]The constitutionality of the Compact was upheld in *U.S. Steel, et al. v. Multistate Tax Commission, et al.*, 434 U.S. 452 (1978), affirming 417 F. Supp. 795 (S.D.N.Y. 1976). This Court there noted that the Compact "* * * symbolized the recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both State and taxpayer."

Article IV of the Compact sets forth the provisions of the Uniform Division of Income For Tax Purposes Act (UDITPA).[4]

It is important that this language be interpreted to carry out the purpose of the 29 states in adopting UDITPA. This purpose is to provide for uniformity and full accountability (without duplication) in the division of income for state income tax purposes by workable and rational division of income rules.

Pursuant to its authority under Article VII of the Compact, on February 21, 1973, the Commission approved revised uniform allocation and apportionment regulations which implement UDITPA. It is estimated that 18 states have adopted these regulations substantially in the form as adopted by the Commission.[5]

The present case raises matters of vital interest to the MTC and the states. They are concerned with the proposition advanced by Mobil, C.O.S.T. and the N.A.M. that, under the Constitution of the United States, dividends (and presumably other income from intangible

[4]UDITPA was promulgated by the National Conference of Commissioners on Uniform State Laws in 1957 (Uniform Laws Annotated, Vol. 9a, p. 448 et seq). It has been adopted by a great majority of the income tax states (Eleventh Annual Report of the Multistate Tax Commission (1977-1978), Appendix B, p. 28). Its purpose is to provide for the uniform allocation and apportionment of income for state income tax purposes by those states that adopt it. Section 1(a) defines "business income" which is subject to apportionment as:

> "* * * income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

Section (e) defines "nonbusiness income" which is subject to specific allocation as:

> "* * * all income other than business income."

[5]Results of a Survey on the Uniformity of State Laws by the State of Indiana dated February 15, 1977.

properties based on the nature of their arguments)[6] must be arbitrarily assigned to the "commercial domicile" of the payee corporation rather than to where the taxpayer utilizes these intangible properties and the income derived therefrom in conducting its unitary activities, as required by a reasonable interpretation and application of the Vermont corporate income tax law.

More specifically, they are concerned with an interpretation of the commerce clause which would prevent, in practical operation and effect, any significant state income taxation of large, complex, integrated domestic multinational corporations. If Mobil's position is sustained by this Court, they believe that these corporations, which conduct their unitary business operations throughout the world through numerous affiliated and subsidiary corporations, can escape from any significant state income taxes by obtaining their profits from these business operations in the form of income from intangibles from their subsidiary and affiliated corporations and by attributing such income to states where it is not taxed by application of the illusive legal fiction "commercial domicile."[7]

[6]Although Mobil limits its appeal to so-called "foreign source" dividends, it and its amicus curiae do not contend that their constitutional arguments can be so limited. Mobil's constitutional arguments and that of its amicus would appear to apply with equal validity (or invalidity) to any other form of income from intangibles such as income from royalties, patents, trademarks, goodwill, contractual obligations, interest, etc. In fact, their arguments could apply to any "property" which they could label as producing "foreign source" income.

[7]In regard to the "commercial domicile," no significant income producing activity takes place at the commercial domicile as pertains to passive "investments" in wholly owned and created subsidiary corporations which justifies the taxation of the great bulk of the income of multinational corporations by the state of "commercial domicile." For example, we believe that an indepth analysis of Mobil's activities would reveal that its so-called "dividend" income is attributable to its involvement in and management of a worldwide petroleum and petroleum related business rather than to "investments" as such in the stocks of its subsidiary and affiliated corporations.

The Commission and the participating states are especially concerned in preventing any resolution of this case from spilling over indiscriminately into their state tax policies represented by the carefully thought-out and reasonable attribution rules incorporated in the language of UDITPA[8] and comparable income tax attribution laws.

We are also concerned that vaguely defined foreign tax policies, which allegedly shape federal income tax consequences, may be utilized as a constitutional standard to prevent a fair and uniform state or local tax system which is necessarily dependent upon different policies and jurisdictional prerequisites. In this connection we are particularly disturbed by the position of Mobil and its amicus curiae that alleged international tax policy of the United States *designed solely to protect the United States citizens, residents and corporations from discriminatory or inappropriate taxation by other nations* dictates how the states and their political subdivisions may constitutionally tax domestic United States corporations. We are particularly concerned on reliance of such an argument to invalidate a state income tax law which is confined solely to a reasonable apportionment of "federal taxable income" attributable to that part of a unitary business conducted in the taxing state.

[8]If this Court should hold, as a matter of constitutional law, apart from factual underpinnings, that dividends from "foreign sources" are subject to tax only at the commercial domicile, it would cast a serious cloud on the constitutionality of the apportionment rules of UDITPA pertaining to all forms of income from intangible properties. While UDITPA, unlike the Vermont income tax law, specifically requires the apportionment of dividends and other income from intangibles only if such income is connected with the unitary business of the taxpayer which is carried on in part in the taxing state and requires the specific allocation of this income if not so connected, we discern nothing in the general abstract constitutional arguments of Mobil and its amicus which would distinguish UDITPA from the Vermont law. They are not here contending that the Vermont law, which apportions "federal taxable income" by a three-factor apportionment formula, in fact is intended to or in fact includes in apportionable income any income of Mobil which is not connected with Mobil's unitary business conducted in part in Vermont for the years in question.

Of concern also is the position of Mobil and its amicus curiae that this Court should resort to hypothetical constitutional reasoning and legal fictions to prevent what they label as a "risk of multiple taxation" because of the lack of uniformity in state income attribution rules. As a matter of fact, this lack of uniformity has never been shown to result in any duplicate taxation of the income of any multinational corporations such as Mobil and the members of C.O.S.T. and the N.A.M. In fact, based upon such argument, Mobil here contends that virtually all of its net income should be exempt from any state taxation whatsoever. As a practical matter, Mobil's and its amicus' constitutional equation is that "risk of multiple taxation equals tax preference or immunity."[9]

Finally, the states have a vital interest in assuring that all businesses carrying on activities within their jurisdictions, and benefiting from governmental services and functions, bear their fair share of the public cost of these activities. This is not just a question of revenues, it is a question of tax justice as well.[10]

---

[9]In this connection, we are confident that if the present state tax system in fact resulted in any duplicate taxation of the total income of any multinational corporation participating in this litigation, such as C.O.S.T. or N.A.M. members, any such dramatic and significant results would have been brought to the attention of this Court. To our knowledge, no such result has ever been presented to a state tax administrator. Furthermore, if it were, we have been assured by many state tax administrators that such a result would trigger a basis for administrative relief. In fact, based on the experience of the MTC, the failure to achieve better uniformity in state income tax attribution rules and the resistance of C.O.S.T. and the N.A.M. to the Multistate Tax Compact (which makes available the UDITPA attribution rules *as an option* to the taxpayer) stems from the fact that the present attribution rules result in substantial undertaxation of the income of large influential multinational corporations such as the members of C.O.S.T.

[10]It is imperative that state and local taxes bear as even-handedly as possible on all business activities conducted within the respective state and local jurisdictions. Only in this manner can small interstate businesses, which are still the foundation of our free enterprize system, hope to compete with their larger multistate-multinational competitors. Only in this manner can these competitors also receive tax equity and

In regard to corporate privilege taxes on or measured by net income, we believe that this can be best accomplished by reasonable apportionment of the income of a unitary trade or business carried on in part in the taxing state rather than by resorting to the illusive legal fiction of "commercial domicile" which is subject to manipulation and control solely in the discretion and judgment of multinational corporations.[11]

In addition to the foregoing, as a pragmatic proposition, we are concerned with the status of the record in this cause in light of the broad factual and legal conclusions which Mobil and its amicus rely on in support of their constitutional arguments.[12]

---

fairness. In the instant case, however, Mobil and its amicus would require Vermont to tax Mobil's instate competitors on an entirely different basis than it taxes Mobil, with the result that Mobil is virtually free for the years in question from any state income taxes except for those states which utilize combined reporting. If constitutionally possible, any such result should be avoided.

[11]Tax jurisdiction based upon "commercial domicile" in the light of modern business practices of multinational corporations may involve no more tax substance as pertains to intangible properties and income therefrom than the traditional reliance on the state of incorporation ("legal" domicile.)

The general nature of the problems involved are discussed in Dexter, "Taxation of Income from Intangibles of Multistate-Multinational Corporations," 29 Vand. L. Rev. 401 (1976) and Corrigan, "Interstate Corporate Income Taxation—Recent Revolutions and a Modern Response," *Ibid.*, p. 423.

[12]As we view Mobil's due process and commerce clause arguments, they are founded on the totally unsupported proposition that its so-called "investments" in wholly owned subsidiary corporations (which it undoubtedly created to carry on its integrated, interrelated "unitary" worldwide petroleum and petroleum-related business) is completely unrelated to those aspects of this business which it carried on for the years in question in Vermont. However, there is absolutely nothing in the record in this cause to substantiate this argument except that it manages its "investments" and income therefrom from without Vermont. Nor is there any factual support for Mobil's "multiple risk" commerce clause argument. Mobil assumes that existing differences in state allocation and apportionment rules produces multiple taxation when in fact, as applied to Mobil, the exact opposite is true. Inasmuch as Mobil has the burden of proof to establish the unconstitutionality of the Vermont corporate income tax law as applied to it, the factual gaps in the record must be resolved in favor of Vermont.

COUNTERSTATEMENT OF QUESTIONS INVOLVED

We cannot accept Mobil's statement of questions involved.[13]

We believe the issue in this case may be properly framed as follows:

Is a state corporate privilege tax, on or measured by that portion of a corporation's federal taxable income which is attributable to the state by the generally accepted and used three-factor apportionment formula, invalid under either the due process clause or commerce clause of the Constitution of the United States (A) when applied to a taxpayer that failed to prove either (1) that income attributable to the taxing state is not a reasonable measure of its corporate privileges, income and benefits associated with activities in the taxing state; or (2) that the income subject to apportionment is not derived by the taxpayer from properties which are utilized by the taxpayer in the

[13]Question 1 as presented by Mobil is predicated on several false premises, including (1) that inclusion of gross dividend income in an apportionable tax base constitutes the taxation of such gross dividends; and (2) that Mobil's gross dividends (primarily derived from four subsidiary and affiliated corporations) is completely disassociated from its unitary business which it carried on in part in Vermont. We believe the facts that (1) Vermont is not attempting to tax Mobil's dividend income by application of its apportionment formula to Mobil's federal taxable income, any more than it is attempting to tax Mobil's income from out-of-state refining and other operations; and (2) Mobil's presumed utilization of its dividend income and stocks in connection with its unitary business carried on in part in Vermont, alone disposes of Mobil's due process of law argument.

In regard to Mobil's second question presented, irrespective of how Mobil would construe foreign commerce clause limitations on state taxing power, there is absolutely nothing in the record to support its argument that the inclusion of so-called "foreign source dividends" in an apportionable income tax base constitutes a taxation of income from or activities in foreign commerce or subjects these dividends to any greater risk of multiple taxation that would the taxation of such dividends by the commercial domicile.

The third question presented by Mobil, its argument that the taxation of foreign source dividends on an apportionment basis conflicts with established federal policy in regulating foreign commerce, totally lacks any legal or factual foundation.

conduct of a unitary business which it conducts both within and without the taxing state; and (B) when dividends from the taxpayer's stock in its foreign subsidiary and affiliated corporations is included in federal taxable income even though the taxpayer's activities in regard thereto takes place without the taxing state and the taxpayer maintains its legal and commercial domicile without the taxing state.

STATEMENT OF THE CASE

A. HISTORY OF PROCEEDINGS.

§ 5831 of Vermont Law[14] imposes the Vermont corporate income tax on the income earned or received in the taxable year by every corporation at a 6% flat rate for the years in question. § 5811(18) defines the tax base subject to apportionment as "the taxable income of the taxpayer for that taxable year under the laws of the United States, excluding income which under the laws of the United States is exempt from taxation by the states." § 5833 provides for the apportionment of a corporation's income by the generally accepted and used three-factor apportionment formula if its income is "derived from any trade, business or activity conducted both within and without" Vermont.[15]

§ 5833 further provides in subsection (b) that if the apportionment formula as applied to a corporation's trade, business or activity conducted both within and without Vermont, does not fairly represent the extent of the business activities of the corporation within Vermont:

> "* * * the corporation may petition for, or the Commissioner may require, with respect to all or any part of the corporation's business activity, if reasonable: (1) separate accounting; (2) the exclusion or modification of any or all of the factors; (3) the

[14]References herein are to sections of 32 Vermont Statutes Annotated (V.S.A.)

[15]This statutory framework is explained in greater detail in the opinion of the Vermont Supreme Court at pages 19a-20a of the Jurisdictional Statement.

inclusion of one or more additional factors which will fairly represent the corporation's business activity in this state; or (4) the employment of any other method to effectuate an equitable allocation and apportionment of the corporation's income."

Without requesting any relief permitted by § 5833(b), Mobil filed its Vermont corporate income tax returns[16] for tax years 1970, 1971 and 1972 (the years in question) by deducting from its federal taxable income all of its gross dividend and an unexplained portion of its gross interest income, as well as "foreign taxes" which were not deductible in arriving at "federal taxable income."

For the year 1970, the dividend exemption taken by Mobil on its Vermont corporate income tax return amounted to $174,211,073.60 of the total federal taxable income of $220,035,244.23 or *79%* of its federal taxable income (A37); for the year 1971, $282,217,008.65 of federal taxable income of $308,255,570.02 or *92%* (A51); and for the tax year 1972, *121%* (A65). In arriving at federal taxable income, Mobil deducted all of its expenses, *including interest and all general offices and overhead expenses* and other deductions such as depletion, intangible drilling costs, etc., presumably as allowed for federal income tax purposes. The factors in the apportionment formula indicate, as shown on Mobil's returns, that all of its property, payroll and sales were included in the denominators (*including any overhead, payroll and property utilized in its so-called "investment" activities* and any sales or service receipts from its subsidiary and affiliated corporations).

[16]While the record does not disclose on what basis Mobil filed its federal income tax returns, the schedules from these returns (A38-A45, A52-A59, A66-A73) indicates that Mobil filed its federal income tax returns for the years in question on a consolidated reporting basis. Thus "federal taxable income" on Mobil's Vermont returns are *pro forma* returns which are products of Mobil's "separate accounting" in regard to any transactions or dealings with its subsidiary and affiliated corporations. What constitutes its dividends from its subsidiary and affiliated corporations is a product of this "separate accounting."

Mobil thus deducted from its Vermont tax base subject to apportionment all of its costs relative to its activities pertaining to its "investments" and included in its out-of-state tangible property, payroll and sales all of its tangible property, payroll and sales pertaining to its "investments."

These returns further indicate that it had property, payroll and sales in Vermont as follows:

YEAR	PROPERTY*	PAYROLL	SALES
1970	$3,930,100(A36)	$236,553(A35)	$8,554,200(A35)
1971	$6,707,534(A50)	$244,577(A49)	$9,175,931(A49)
1972	$8,236,792(A64)	$254,938(A63)	$9,589,447(A63)

*Includes capitalized rental properties.

As a result of averaging the foregoing Vermont numerators to the everywhere denominators of Mobil, the Vermont apportionment factor apportioned .146032% of Mobil's taxable base income to Vermont for 1970, .173647% for 1971 and .182151% for 1972 (A36, A50 and A64 respectively).

These factors, after the deduction of the dividends includable in federal taxable income, would attribute $63,772 of income to Vermont for the tax year 1970, $45,038 for 1971 and a minus $87,064 for 1972 for a *net total of $21,496*. Yet, as indicated by the apportionment factors disclosed on Mobil's returns for the years 1970-72, Mobil increased its investment in tangible properties in Vermont from $3,508,596 at the beginning of 1969 to $6,328,183 at the end of 1972 or a total increase of $2,819,587.

From the property everywhere factor (denominator of the factor), as disclosed on Mobil's returns, the tangible property values of Mobil increased from $2,388,272,971 beginning in 1970 to $2,864,792,471 at the end of 1972, or by approximately one-half billion dollars. This amount is in excess of Mobil's federal taxable income minus its dividends included therein ($24,322,057, which constitutes the income it would attribute to its business activities conducted in part in Vermont) by $452,196,443 for the years in question.

From an examination of Mobil's balance sheets for the years 1970-1972, filed with its Vermont and federal income tax returns for these years (A44; A58; A72), there is no indication that its total income for these years was not utilized by Mobil in furtherance of its overall business activities which it has attributed, in part, to Vermont for the years in question.[17]

An examination of the *pro forma* U.S. Corporate Income Tax Returns of Mobil, Form 1120, page 1, accompanying its Vermont tax returns for the years 1970-1972 (A38-39; A52-53; A66-67) also denotes the integrated nature of Mobil's business activities. The only adjustments that Mobil made to its federal taxable income for Vermont income tax purposes for the years in question consisted simply of arbitrarily deducting as "non-apportionable income" its gross dividend income to the extent included in federal taxable income, an undisclosed and unexplained portion of its gross interest income and "foreign taxes not deductable for federal income tax purposes." (A37, A51, A65)

After these adjustments to federal taxable income, Mobil simply applied the Vermont apportionment formula, determined by reference to Mobil's total tangible properties, payrolls and sales (irrespective of location, nature source or use) to its Vermont tangible property, payroll and sales. In other words, Mobil filed its Vermont income tax returns on the basis that all of its business activities and expenses and income derived therefrom, were directly related to the conduct of a unitary business both within and without Vermont. Inconsistent therewith, without explanation, it deducted the dividend income here

[17]During this period, its total assets increased by approximately 1.1875 billion dollars and its liabilities increased by approximately 401.8 million dollars. During this period its cash decreased by 92 million dollars, its trade accounts increased by 29.3 million dollars, its other current assets by approximately 75.9 million dollars, its buildings and fixed assets increased by 518.9 million dollars, land net of amortization increased by 102.8 million dollars and other investments increased by 3.826 billion dollars.

in question, as well as interest and foreign taxes, from federal taxable income for Vermont apportionment purposes.

Based on the returns as filed, Mobil paid a Vermont tax of $1,821 for 1970, and a minimum tax of $25.00 for the years of 1971 and 1972 (A34, A48, A62), which tax equals *.00000684%* of its Vermont sales for these years.

Apparently, as a result of a desk audit of Mobil's 1970-1972 returns, Vermont concluded that Mobil had not shown any justification under the Vermont statutes or laws of the United States why its dividend income, interest income and "foreign taxes" (which were not deductable for federal income tax purposes) should be deducted from Mobil's income subject to apportionment. Vermont thus determined that Mobil's corporate income tax liability should be in the amount of $71,643.77 for the years 1970-1972 (Juris. St. App. A, 1a). This represents a tax of *.00026229%* of Mobil's Vermont sales for these years.

Mobil objected to this result and requested and obtained an administrative hearing before the Commissioner of Taxes of Vermont in regard thereto. At the hearing, counsel for Mobil proferred a Stipulation of Facts, which was accepted as the "testimony" of Mobil's counsel (A17).[18]

[18]This "Stipulation of Facts" is set forth on pages A79-A91 of the appendix, except for the exhibits, other than Exhibits 1, 2, 3 and 8, referred to therein and made a part of the record. Exhibits 1, 2 and 3 are the Vermont corporate income tax returns for each calendar year 1970, 1971 and 1972 of Mobil (A37-A73); Exhibits 4, 5 and 6 are the assessments in question; Exhibit 7 is Mobil's protest to the assessments; Exhibit 8 is the schedule of Mobil's dividend income by amount and payor corporation for the years 1971-1972 (A75-78); and Exhibits 9, 10, 11, 12, 13 and 14 are Mobil's annual reports and financial and operating statistics for the years 1970, 1971 and 1972. Exhibit 15 lists affiliated companies included in such reports.

Paragraphs (6) through (35), together with Exhibits 8-15 of the "Stipulation," contain the factual material submitted by Mobil in support of its position.

Based on this factual information, Mobil argued before the Commissioner that inclusion of its dividend income in apportionable income amounted to taxation of the dividends, in violation of due process of law limitations, because, "* * * there is simply no relationship between this income which is sought to be taxed and the state of Vermont." (A20) Based on this conclusion and the further conclusions that: (1) the commercial domicile had the power to tax the dividend and interest income in full; and, (2) the commerce clause prevents any risk of multiple taxation, Mobil further argued that the inclusion of dividend income in apportionable income was invalid under the commerce clause.

As part of its commerce clause argument, Mobil further argued that the inclusion of dividend income in Vermont apportionable income constituted the taxation of foreign commerce, in controvention of the power of Congress to regulate commerce with foreign countries.

The only facts in the record in support of Mobil's argument here are those contained in paragraphs 6-12, 25, 26 and 33 of the "Stipulation."[19]

[19]These paragraphs read:

(6) Mobil is engaged in the petroleum business in the United States, including exploration, production, refining, transportation, distribution and sale of petroleum and petroleum products. In addition Mobil conducts petro-chemical, chemical coatings, plastics and phosphate rock mining businesses in the United States.

(7) Mobil's corporate headquarters, principal place of business and commercial domicile are not in Vermont but are located at 150 East 42nd Street, New York, New York. *Mobil's business is not managed, controlled or directed from the State of Vermont.*

(8) *Mobile does business in all of the states* of the United States, the District of Columbia, has a small branch in Greece and engages in interstate and foreign commerce. Mobil is *subject to net income taxes or franchise taxes measured by net income imposed by some forty other states* and the District of Columbia.

(9) Mobil's only activity within the State of Vermont is the wholesale and retail marketing of petroleum products and related products. Mobil has no refineries or oil or gas production within the State of Vermont.

In regard to the stipulation of facts, it is of critical importance in this case to note that Mobil did not establish or seek to establish that the stock investments in question and the dividends derived therefrom were assets which were unrelated to its unitary business, which it carried on in part in Vermont and which business was the subject matter of the Vermont apportionment formula. Mobil sought only to establish that its activities in regard to these assets were not conducted in Vermont. Furthermore, Mobil offered no proof and did not contend that any

(10) Mobil owns directly and indirectly capital stock of a large number of foreign subsidiary and domestic and foreign nonsubsidiary corporations. At December 31st of each year Mobil owned directly or indirectly capital stock of foreign subsidiary and 5% or more of domestic and foreign nonsubsidiary corporations as follows:

	1970	1971	1972
Foreign Subsidiary Corporations	203	208	216
Domestic Nonsubsidiary Corporations	26	27	27
Foreign Nonsubsidiary Corporations	185	189	197

(11) *The aforementioned capital stocks were held, managed and controlled by Mobil from its offices outside Vermont. Payment of all dividends was received by Mobil outside Vermont and Mobil's control, use and disposition of such dividends were managed and directed from Mobil's offices outside Vermont.*

(12) There is attached as Exhibit 8 a schedule of Mobil's dividend income for the years 1970 through 1972 subjected to tax by the assessments of the Department of Taxes of the State of Vermont.

(25) None of the corporations listed in Exhibit 8 which are 5% or more owned by Mobil is organized under the laws of Vermont, did business in Vermont, owned or leased property in Vermont, maintained an office in Vermont, had employees in Vermont or derived income from sources in Vermont. With respect to the corporations listed in Exhibit 8 as to which Mobil owns less than 5%, to the best of Mobil's knowledge and information the foregoing statements likewise apply.

(26) More than 99% of the dividends here in issue were received from corporations deriving all or all but an insignificant portion of their income from sources outside the United States.

* * * * *

(33) The income of each of the corporations referred to in paragraphs 26 to 32 inclusive were derived to a substantial extent from foreign commerce. (Emphasis added.)

of its dividend income was in fact taxed by any state or country on the basis of specific allocation of this income or that it paid any taxes to other countries.

Based on the foregoing record and argument and *Woolworth v. Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972), [including the Supreme Court of Vermont's reliance therein on *Woolworth Co. v. Director, Division of Taxation*, 45 N.J. 466, 213 A.2d 1 (1965) and other unitary cases], the Commissioner of Taxes applied the unitary concept in upholding the assessments against Mobil for the years 1970-1972.[20] (Juris. St. App. A, pp. 1a-13a). Mobil's arguments before the Vermont courts were limited to its "multiple risk" commerce clause argument.[21]

---

[20]Significantly, the Commissioner of Taxes stated:

The Vermont Supreme Court in the *Woolworth* decision specifically stated at 130 Vt. 544, 549:

> In its holding the court in *Gulf Oil Corp. v. Morrison*, supra, 120 Vt. 330 held the inclusion of dividends in the allocation formula did not serve to make the formula operate in an arbitrary manner.
>
> * * *
>
> This court's approach towards the inclusion of such items of net income as dividends and capital gains in the allocation formula for franchise taxation purposes has been accepted in other jurisdictions. The basic rationale of their inclusion was state in *F. W. Woolworth Co. v. Director, Division of Taxation*, 45 N.J. 466, 213 A.2d 1, 9 (1965) where that court said:
>
> * * *
>
> the realistic value of the exercise of a franchise in a particular state is enhanced and contributed to by the worth or income of the entire enterprise * * *
>
> Typically, this approach is followed where there is unity in use and management of the enterprise being taxed.

[21]Apparently, its argument was so limited Mobil felt that the prior Supreme Court of Vermont decisions of *Gulf Oil Corporation v. Morrison*, 120 Vt. 324, 141 A.2d 671 (1958); *Woolworth v. Commissioner of Taxes, supra;* and *In Re Goodyear Tire & Rubber Company, Corporate Income Tax 1966, 1967, 1968*, 335 A.2d 310 (Vt. 1975), foreclosed any other commerce clause or due process arguments.

In reversing the decision of the Commissioner, the trial court simply held that the Vermont income tax statute, to the extent it included dividends and interest income in apportionable income, violated what it deemed to be the "multiple risk" doctrine of the commerce clause.[22]

The question before the Vermont Supreme Court for resolution and Mobil's contentions are stated as follows by the Court:

> Mobil does not claim that it was not a taxable corporation during the years in question, nor does Mobil argue that the apportionment formula resulted in too great a percentage of it tax base being subject to taxation in this state. Rather, Mobil objects to its investment income being included in its Vermont tax base at all. Mobil filed tax returns during each of the years in question, determining its tax base by applying the apportionment factor, reckoned according to the statute, to operating income only. That is, in determining its "Vermont net income" for each year, Mobil took its net income for federal income tax purposes and reduced this figure by amounts representing dividend and interest income. This is not authorized by law, and upon audit the Vermont Department of Taxes added the amounts back in and assessed deficiencies. (Juris. St., p. 21a)
>
> * * * * *
>
> The single question presented here is: Does Vermont's application of its apportioned net income tax to the investment income in issue constitute multiple taxation prohibited by the Commerce Clause?
>
> Mobil's argument that Vermont's tax would impose an unconstitutional burden on interstate commerce involves a number of propositions. The first is that taxes subjecting interstate businesses to a

---

[22]In so holding, the trial court, as a matter of law, had to assume (1) that the commercial domicile had the power to tax such income in full; (2) that the commerce clause prohibited any risk of multiple taxation of any item of income; and (3) that the "commercial domicile" rule took precedent over the "apportionment rule." The Vermont trial court offered no explanation in support of any of these assumptions.

risk of multiple taxation not borne by interstate business violate the Commerce Clause. The next is that the test of multiple taxation is the power of other jurisdictions to tax rather than the exercise of that power. The last is that the state of a corporation's commercial domicile, in Mobil's case New York, has the constitutional power to tax its corporation's dividend and interest income without apportionment. Mobil argues that if New York has the authority to tax all of Mobil's investment income, there is a risk that it will do so. If Vermont's tax upon a portion of the same income is sustained, there then will be a risk of multiple taxation. If the mere existence of the power is the constitutional test, then an impermissible burden would be shown by establishing New York's right to tax without apportionment. (Juris. St., pp. 22a-23a).

Since the Supreme Court of Vermont did not find that Vermont lacked the constitutional authority to impose a properly apportioned corporate income tax on that part of "federal taxable income" attributable to activities and sources in Vermont, based on such arguments, it reversed the decision of the trial court and upheld the assessments in question.

Mobil here challenges the validity of the decision of the Vermont Supreme Court under the due process and commerce clauses of the U.S. Constitution, although it raised no due process argument before the Vermont Supreme Court.

B. ANALYSIS OF THE FACTUAL RECORD.

In light of Mobil's arguments, and that of its amicus, it is important to determine the status of the record. Since Mobil has the burden of proof to establish its claim to constitutional immunity, *Norton Co. v. Department of Revenue*, 340 U.S. 534, 537 (1951), the following facts to the extent relevant, must be deemed to be true:

(1) Mobil, for the years in question, conducted an integrated world-wide unitary business with its affiliated and subsidiary corporations and conducted that business, in part, in Vermont for the tax years in question.

(2) The "investments" of Mobil in the stocks in question and the income from these investments were used by Mobil in the furtherance of and in the conduct of its petroleum and petroleum related business, which it conducted in part in Vermont, and these stocks and income therefrom constitute a part of the unitary trade or business of Mobil.[23] (The fact that Mobil does not carry on its unspecified activities concerning its stock "investments" in question in Vermont is irrelevant in regard to the unitary nature of Mobil's business which it apportioned in part to Vermont.)

(3) An appropriate analysis of Mobil's dealings with its wholly owned subsidiaries could reveal that what Mobil received as "dividends," from stock "investments" in fact constituted significant income which should be reclassified as Mobil's "operating income" from its petroleum and petroleum related businesses which it conducted in part in Vermont for the years in question.[24]

---

[23]For ought that appears in the record, it could be assumed that Mobil made the stock investments in question and utilized the income from these investments to specifically further the conduct of its business in Vermont. For example, it could be assumed that it created its wholly-owned subsidiaries of Mobil Marine Transportation, Ltd., Mobil Oil Iraq with limited liability and Pegasus Overseas, Ltd., from which it received substantially all of the dividend income in question in furtherance of its petroleum and petroleum related marketing activities in Vermont.

[24]This statement may be illustrated by the following hypothetical example. Assume that Corporation A manufactures patented widgets and sells them to Corporation B, a wholly owned subsidiary, at or near cost. Corporation B in turn sells them at a substantial profit and returns that profit to Corporation A in the form of "dividends." Obviously what should be truly classified as "dividend" income of Corporation A and income from Corporation A's manufacture of widgets cannot be ascertained. Any such simplified picture would be compounded if there were various other unitary ties between Corporation A and Corporation B and if the income from Corporation B's sale of the widgets was filtered through a large number of subsidiary corporations of Corporation A (as well as subsidiary corporations of such subsidiaries) that performed vertically integrated operations in the production, financing, development and marketing of widgets.

(4) The fact that Mobil's first tier subsidiary and affiliated corporations do no business in Vermont and derive unsubstantial amounts of income from "sources" within the United States does not establish their subsidiary and affiliated corporations do not do so.[25]

The presumed facts that Mobil, together with its world-wide subsidiary and affiliated corporations, is conducting a fully integrated international petroleum and petroleum related business, is substantiated by (1) Mobil's consolidated annual reports and financial and operating statistics for the years 1970, 1971 and 1972 (Exhibits 9-14 to the Stipulation); (2) various public reports, such as Mobil's *Form 10-K Annual Reports* filed with the Federal Securities and Exchange Commission; and (3) the information pertaining to Mobil published in the authoritative *Moody's Industrial Manual.*

---

[25]For example, Corporation A may have a subsidiary Corporation B that conducts all of its business activities of producing crude oil in Canada which Corporation B in turn sells to its own subsidiary, Corporation C for refining and sale in the United States, including the state of Vermont. Under such circumstances, Corporation B does not have any United States source income unless it maintains a "permanent establishment" in the United States. Yet, it is obvious that this is not true as to its subsidiary, Corporation C.

The type of factual pattern in the above example can be illustrated by *Appeal of Texaco, Inc.* (Calif. State Bd. of Equal. decision of January 11, 1978; CCH Cal. Rpts. ¶ 205-821). In that case, a wholly-owned subsidiary of Texaco, as contemplated by a consortium agreement by eight oil companies (apparently including Mobil, see p. 1, 1972 10-K report of Mobil), was formed as a paper corporation to hold Texaco's interests under the agreement and to purchase oil from the National Iranian Oil Company for 12½% of the posted price. This subsidiary in turn sold the oil at the "posted price" to another wholly-owned subsidiary of Texaco that in turn sold the oil at a loss on the world market. If the second subsidiary had been formed by the first subsidiary as a second tier corporation and if the second tier corporation did business in the United States and Vermont, the *Texaco* example would conform to our hypothetical example.

As to the nature of the problems posed by the foregoing example, see a note entitled: "Multinational Corporations and Income Allocation Under Sec. 42 of the Internal Revenue Code," 89 Harv. L. Rev. 1202 (1976).

As indicated in *Moody's* for 1972:

"The company [Mobil Oil Corporation], together with subsidiaries and affiliates, is a fully integrated international oil company, having crude oil production, pipeline and marine transportation facilities, refineries and wholesale and retail distributing stations and equipment. (Bracketed material added)

* * * Products are sold in more than 100 countries in the free world. Mobil also manufactures and sells a wide range of chemicals." (Moody's Industrial Manual, 1972, p. 117)

As set forth in Mobil's 10-K Report for 1972, p. 1:

"Mobil Oil Corporation, one of the major international oil companies, was incorporated in the State of New York in 1882. The corporation conducts an integrated business in the production, transportation, refining, and marketing of petroleum and natural gas and products thereof, and in the manufacture and marketing of chemicals."

What Mobil means by this statement in its 1972 10-K Report is expanded in considerable detail in its Annual Reports to its stockholders. (Exs. 9-11 to the "Stipulation of Facts") It is also substantiated by the testimony of William P. Tavonlareas, President of Mobil Oil Corporation, before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, Washington, D.C., January 21, 1976, in opposition to divesture of the major oil companies.

By far the largest single payor of dividend income to Mobil for the years in question, was Mobil Marine Transportation, Ltd. (Ex. 8, A75) "Transportation" of Mobil is graphically illustrated and commented upon on pages 8-11 of its 1972 Annual Report to stockholders. Mobil there noted the economy of size and the utilization of its ships in United States coastal trade. It offered the following comment on page 10:

"In the United States, we are taking part in studies to determine the feasibility of constructing vlcc (very large crude carriers) travel on the gulf and east coast.

> At present, no U.S. port can accomodate a full loaded vlcc. As the abundance of imported oil grows, larger terminals will be increasingly needed to handle them economically."

Again, in commenting on its exploration and producing activities in its 1972 Annual Report to stockholders at pages 4-7, Mobil indicates the world-wide integrated nature of its activities and its "investments" in this regard.

Nowhere in the foregoing reports is there any indication that Mobil as a parent is engaged in any investment activities as a "holding company" or in any investment activities apart from its petroleum and petroleum "related business." In fact, on page F-1 of its 1972 10-K report, it stated:

> "Individual financial statements of the Corporation [Mobil] have been omitted because (a) the Corporation is primarily an operating company and (b) the Corporation owns substantially all of the equity securities of and has guaranteed substantially all of the debt of its consolidated subsidiaries."

In regard to the dividends in this cause, as indicated by Ex. 8 (A75-A78), the great bulk of the dividend income in question, which Mobil labeled as "foreign source dividend income" (what Mobil means by "foreign source" is undefined in this record), was received by Mobil from three wholly-owned foreign incorporated subsidiaries and from its 10% interest in the Arabian-American Oil Company (ARAMCO). The dividend income from these corporations for the years in question compared to the total dividend labeled as "foreign source dividend income" on Exhibit 8 is as follows:

COMPANY	AMOUNT OF DIVIDEND			DIVIDEND TOTALS
	1970	**1971**	**1972**	**1970-1972**
Mobil Marine Transportation, Ltd.	49.6	151.8	167.4	368.8
Mobil Oil Iraq with Limited Liability	45.0	71.2	51.3	167.5
Pegasus Overseas, Ltd.	51.0	25.2	8.9	85.1
ARAMCO**	1.7	1.8	25.5	29.0
Subtotal	147.3	250.0	253.1	650.4
All Others	26.7	32.4	26.8	85.9
Total	174.0	282.4	279.9	736.3
% of Total	**84.7%**	**88.5%**	**90.4%**	**88.3%**

*To closest 1/10 of million dollars.
**Includes only 15% of ARAMCO dividends because only 15% were included in federal taxable income and thus, in income subject to apportionment under Vermont law.

While the record is silent as to the nature of the activities of these subsidiary corporations and their relationship to Mobil's unitary petroleum business, it is fair to assume that they and their subsidiaries and affiliates are involved in worldwide production and transportation of petroleum and petroleum related products.[26]

The foregoing assumptions pertaining to the integrated nature of Mobil's business with that of its affiliated and subsidiary corporations is substantiated also, as to prior years, by its pleadings filed in proceedings before the Corporation Tax Appeal Board of the State of Michigan in Docket Nos. 59-5 and 60-6, which involved the Michigan Corporate "net worth" franchise tax. Mobil, in its Amended Complaint in Docket No. 59-5, sworn to by its Assistant Treasurer, alleged as follows:

FOUR: Throughout the calendar years 1952 and 1957, inclusive (which are the base years by reference to which

[26]These corporations, as well as other subsidiaries of Mobil, are so integrated with Mobil's reports and financial statements, there is no way to identify them apart from Mobil in any respect whatsoever.

the tax liability for the respective tax years 1953 and 1958, inclusive, is determined, such years being hereinafter referred to as "base years"), the facts upon which appellant relies in support of this appeal were as follows:

1. Appellant was a New York corporation maintaining its principal and executive offices in New York City, from which it operated an integrated worldwide oil business as a producer, refiner, transporter, and marketer of crude petroleum and its refined products. It operated directly through divisions and branches in some states, including Michigan, but in other states and in almost all of its far-flung worldwide operations, the business was conducted through subsidiary and affiliated corporations. * * *

Appellant further specifically alleges the fact to be that during the period involved, the consolidated group (comprising the parent company and all of its subsidiaries and affiliates) constituted one organic, functional whole; and that each subsidiary and affiliated company and the consolidated group (comprising the parent company and its subsidiary and affiliated companies) as a whole derived economic strength and power from appellant's centralized supervision, management, and control, as will be more fully shown by evidence at the hearing.

2. During the base years, appellant had substantial interests in subsidiary and affiliated companies, upwards of 43% of appellant's total assets (subject to some normal variation from year to year) consisting of its investments in its subsidiaries and affiliated companies.

3. In the operation of the petroleum business, the four major functions consist of (a) exploration for and production of crude oil, (b) refining of crude oil into products, (c) marketing either crude oil or products, and (d) transportation of crude oil or products by pipeline, ship, or wheeled vehicle. The parent company and its subsidiaries and affiliates engage in the performance of these four functions in the manner hereinafter described. Each of the subsidiaries and affiliates is engaged in some

phase of the producing, transporting, manufacturing, or marketing of petroleum or petroleum products.

(a) Exploration and production. The parent company did not, during the period here involved, engage in any exploratory operations nor in the production of crude oil either in foreign countries or in the United States (except for an operation in the State of Michigan producing approximately 200 barrels a day). The primary source of "domestic" crude oil (i.e., crude oil produced in Canada) for the parent company and for those of its subsidiaries engaged in the operation of refineries in the United States, is by purchase from four subsidiaries, three in the United States and one in Canada. * * * "Foreign" crude oil (i.e., crude produced outside the United States or Canada) used by the parent company and by those of its subsidiaries engaged in the operation of "Socony" refineries in the United States was obtained principally by purchases made by the particular company from foreign producers. Such purchases were made by the parent company both for refineries operated by it and for refineries operated by some of its subsidiaries in the United States. A large percentage of the "foreign" crude oil used in "Socony" refinery operations in the United States by the parent company or its subsidiaries was supplied by a subsidiary engaged in production of crude oil in South America, Mobil Oil Company de Venezuela, and the wholly-owned subsidiary of an affiliate simiarly engaged, Colsag Corporation. Such sales by these companies accounted for the equivalent of an average of approximately 64% of the crude oil sold by these companies.

(b) Refining. Appellant and its subsidiary and affiliated companies engaged also in the refining of oil. * * * The parent company prescribed formulae, specifications and standards which were conformed to in all refineries operated by it or by its subsidiary or affiliated companies. The parent company conducted refinery research, the results of which were made available to all the refineries operated by subsidiary and affiliated

companies, and the cost of the research was shared by the subsidiary and affiliated companies. The parent company sent technical advisors to all of the refineries operated by it, its subsidiaries, and its affiliates. Patented processes owned by the parent company were made available for use at and were used at refineries operated by subsidiary and affiliated companies. Conversely, manufacturing techniques perfected at refineries operated by subsidiary or affiliated companies were made available for use at and were used at refineries operated by the parent company and by other subsidiary and affiliated companies.

(c) Marketing. Petroleum products produced at refineries operated by the parent company and its domestic subsidiaries were marketed under brand names owned by the parent company, selected by the parent, and identifying the product of a product of appellant, e.g., "MOBILGAS," "MOBILOIL" and "MOBILHEAT" fuel oil. Uniform sales manuals were utilized by all United States divisions and by all United States subsidiaries. National advertising campaigns supported marketing programs of both the parent company and its United States subsidiaries, all of which contributed to the cost of such campaigns. The parent company exercised general superintending control over the marketing of the products (many of which are known by the same "MOBIL" trade name) of its subsidiaries and affiliates in foreign countries. Sales manuals were furnished to foreign subsidiaries and affiliates as prototypes to be translated into the appropriate foreign language and modified to conform with local sales customs and practices.

(d) Transportation. Transportation of crude oil and petroleum products between foreign subsidiaries and affiliates was accomplished principally by fleets of vessels operated by a wholly-owned subsidiary, Mobil Shipping Company, Ltd., and by an affiliated company, Standard-Vacuum Oil Company, Inc., and its subsidiaries. Transportation of "foreign" crude oil to this country, for use in refineries operated by the parent company and its United States subsidiaries, was accomplished principally through

a fleet of vessels operated by another wholly-owned subsidiary, Mobil Tankers Company, SA. Transportation of petroleum products in U.S. coastal and inland waters was accomplished by use of a fleet of coastwise ships and inland floating equipment operated by the marine division of the parent company. All of the United States subsidiaries relied exclusively on the parent company for the importation of their supplies of foreign crude oil; and they relied principally on the parent company for the coastwise distribution of petroleum products. Within the United States, overland transportation of crude oil by the parent company and all of its United States subsidiaries was accomplished in large measure by pipelines owned and operated by the parent company and its subsidiaries. All of the pipelines were available for the use of all subsidiaries.

* * * * *

5. As above specified with reference to the principal and typical subsidiary and affiliated companies, appellant further shows and will establish by proof that the function of each and all of its other subsidiary and affiliated companies was to perform one or more of the required steps in the processing of oil from the underground reservoirs in which it is found to sale to the ultimate consumer under a brand name. The operations of each of the subsidiary and affiliated companies was closely integrated with those of the parent company in the manner hereinafter more particularly specified, viz.:

(a) The parent company in its New York headquarters maintained daily communication with each of the subsidiary and affiliated companies to assure prompt exchange of financial and operational information between all units comprising the consolidated group (i.e., the parent company, its subsidiaries and its affiliates).

(b) The parent company conducted teachnical research and engineering studies relating to refining processes, operations, products, and marketing; and the parent company advised all subsidiaries and affiliated companies of the results thereof.

(c) The parent company and its subsidiary and affiliated companies followed standardized accounting and financial reporting procedures; and the parent company's representatives periodically reviewed the adequacy of these procedures with its subsidiary and affiliated companies in the field.

(d) The financial statements of the parent company and its subsidiaries were consolidated into a single statement for purposes of financial analyses and reports to appellant's stockholders.

(e) The parent company made the initial determination of the financial needs of its subsidiaries.

(f) All subsidary and affiliated companies regularly reported the results of various aspects of their operations to the parent company.

While it is recognized that pleadings in another proceeding for prior years does not establish any facts in this cause, we believe that the foregoing illustrates the reasonableness of the conclusion, when coupled with the other documents referred to herein, that Mobil's "investments" in its subsidiary and affiliated corporations were "investments" in the furtherance of its unitary integrated worldwide petroleum and petroleum related business and that its activities associated with those "investments" were not limited to an investor's management of stocks.

SUMMARY OF ARGUMENT

Beginning with the early property tax case of *Adams Express Co. v. Ohio State Auditor,* 165 U.S. 194 (1896), rehearing 166 U.S. 185 (1897) down to *Moorman Mfg. Co. v. Bair,* 437 U.S. 267 (1978), this Court has uniformly sustained reasonably apportioned state imposed property, franchise or net income taxes. In sustaining these taxes against due process or commerce clause objections, it has never limited the apportionable tax base to in-state values, properties or income. In the application of apportionment formulae in income tax cases, this Court has uniformly held that the states are free to use the "unitary business"

technique even if some components of the unitary business are located outside the taxing jurisdiction. *U.S. Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452 at 473, footnotes 25 and 26; *Underwood Typewriter Co. v. Chamberlain,* 245 U.S. 113 (1920); *Bass, Ratcliff & Gretton Ltd. v. New York Tax Commission,* 266 U.S. 271 at 282 (1924); *Butler Bros. v. McColgan,* 315 U.S. 501 (1942). It has recognized that "net income taxes," unlike gross receipts taxes, are not imposed on any transactions from which net income may be derived. *Peck & Co. v. Lowe,* 247 U.S. 165 (1918). Thus, "Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason income is not necessarily clothed with the tax immunity enjoyed by its source." (*N.Y. ex rel. Cohn v. Graves,* 300 U.S. 308 at 312 (1936) It has upheld unitary apportionment even though applied to income from foreign activities of a foreign corporation which earned no taxable income in the United States for federal income tax purposes. *Bass, Ratcliff & Gretton, supra.* Furthermore, this Court has recognized that the possession of large blocks of intangible properties gives a business a value, in conducting instate activities, which can be considered in imposing a state tax on such activities. *Flint v. Stone Tracy Co.,* 220 U.S. 107 at 166); *Ford Motor Co. v. Beauchamp,* 308 U.S. 331 at 336 (1939), citing *Bass, supra,* and *National Leather Co. v. Massachusetts,* 277 U.S. 413 (1927). It has also held that it is presumed that all of the properties of a corporation contribute to the operations of its business as a whole and the burden is on the taxpayer to prove otherwise. *Adams Express Co. v. Ohio State Auditor,* 165 U.S. 194 at 227 (1896). It has rejected the argument that intangibles associated with a unitary business should be attributable solely to the commercial domicile. *Adams Express Co. v. Ohio State Auditor,* rehearing 166 U.S. 185 at 218). This Court has appropriately held that an apportionment formula is only a rough approximation of income attributable to the taxing jurisdiction and that an

apportionment formula does not purport to identify or tax any income derived from specific sources. *Moorman Mfg. Co. v. Bair,* 437 U.S. 267 at 278-280 (1978). It has thus invalidated an apportionment formula only when the taxpayer has established by clear and cogent evidence that the formula resulted from the taxation of income or values which could not be reasonably attributed to the taxpayer's properties or activities within the state. *Norfolk & Western Ry. Co. v. North Carolina,* 297 U.S. 682 (1968); *Hans Rees' Sons, Inc. v. North Carolina,* 283 U.S. 123 (1931).

While this Court has repeatedly held that the purpose of the commerce clause was to prevent any undue multiple burden on interstate commerce, it has also uniformly held that any prohibited risk of multiple taxation is satisfied by reasonable apportionment rules. *Northwest Portland Cement Co.,* 358 U.S. 450 at 448, 449 (1959); *Japan Line Ltd. v. County of Los Angeles,* ____ U.S. ____ (decided April 30, 1979). It has also refused to engage in hypothetical speculation in resolving any alleged multiple taxation question. *Northwest Portland Cement Co., supra; Standard Pressed Steel Co. v. Dept. of Revenue,* 419 U.S. 506 (1975); *International Harvester Co. v. Dept. of Treasury,* 322 U.S. 340 at 348 (1944); *Northwestern Airlines v. Minnesota,* 322 U.S. 292 at 295 (1944); *Moorman Mfg. Co. v. Bair,* 437 U.S. 267 at 276 (1977); *First Federal S & L v. Massachusetts Tax Comm'n,* 437 U.S. 255 at 262, footnote 9 (1977).

Though different state income attribution rules potentially may result in either undertaxation or overtaxation of income of a multistate-multinational corporation, this Court has refused to interpret the commerce clause as requiring judicially prescribed uniform division of income rules. The proscription of such uniformity involves complex questions which require political, not judicial, resolution. *Moorman, supra,* at 437 U.S. 278-280.

In sum, this Court has concluded that if a state tax is fairly apportioned and non-discriminatory and if it is

applied to an activity with substantial nexus in the state and if it is designed to reasonably compensate the state for services provided, a state tax does not controvene either due process clause (*Moorman, supra,* 437 U.S. 272) or commerce clause (*Japan Line, supra,* Slip. Op. p. 10) limitations on state taxing power.

Notwithstanding these well-established constitutional principles, Mobil and its amicus curiae here contend that Vermont's generally accepted and well-recognized three-factor apportionment formula as applied to Mobil's "federal taxable income" is unconstitutional under both the Due Process and Commerce Clauses of the Constitution of the United States, even though there is no claim that it arrives at an unreasonable result or is applied to nonunitary income. They premise this novel argument on a series of invalid and unsupported factual conclusions and legal assumptions.

They premise their due process arguments on the erroneous legal assumption that Vermont, in including Mobil's dividends in apportionable net income, has imposed a tax on these dividends and on the unsubstantiated factual conclusion that Mobil's stock holdings are unrelated to Mobil's business operations which it conducted in part in Vermont.

However, the fact that Mobil's stock holdings and dividends therefrom are located and managed from without Vermont and the fact that Mobil's legal and commercial domicile is without Vermont does not support the conclusion that its stock holdings and dividends therefrom were not connected with its unitary petroleum and petroleum related business conducted in part in Vermont. Neither does the fact that Mobil's dividends were included in Vermont's income tax base which was subject to apportionment support the argument that Vermont is attempting to tax its dividend income or "foreign commerce."

Inasmuch as the conclusion of an item of income in apportionable income is not the taxation of that item, and inasmuch as Mobil conducted substantial business

operations in Vermont which has not been shown to be disassociated from its stock holdings and its dividends derived therefrom, and inasmuch a Mobil has not shown that Vermont has taxed any income not rationally related to values connected with its Vermont business activities, Mobil's due process argument is frivolous.

As in their due process arguments, Mobil and its amicus premise their foreign commerce argument on invalid assumptions and contentions, including those relied on in support of their due process argument. However, Vermont, by applying its apportionment formula to Mobil's "federal taxable income," is no more subjecting to tax Mobil's dividend income than it is subjecting to tax Mobil's income from its out-of-state refining, producing, marketing and transporting operations. All that Vermont has taxed in this case is an unidentifiable portion of Mobil's income which can be reasonably attributable to its Vermont business by a reasonable and generally accepted three-factor apportionment formula.

Mobil and its amicus assume that the inclusion of dividends in apportionable income of a domestic United States corporation is a tax imposed on "foreign commerce." This argument again disregards the nature and incidence of Vermont's corporate income tax law and the operation and effect of its apportionment formula. Furthermore, even if Vermont in fact taxed Mobil's dividends from its foreign subsidiaries, which is not the case, still it would not be a tax on Mobil's conduct of "foreign commerce." The inclusion in apportionable income of dividends of a domestic U.S. corporation which it derives from its domestic ownership and management of stock in foreign corporations does not constitute the taxation of its foreign operations. This fact, coupled with the fact that Vermont does not seek to tax such dividends, destroys Mobil's "foreign commerce" argument.

Furthermore, in advancing its "foreign commerce" argument, Mobil erroneously argues that *Japan Line Ltd.*

v. County of Los Angeles, supra, is controlling and that *Moorman Mfg. Co. v. Bair, supra,* is not. However, this Court in *Japan Line* carefully limited the additional foreign commerce clause standards there enunciated to foreign corporations engaged solely in international commerce. It there found that any undue risk of state multiple taxation of domestic corporations could be policed by appropriate application of apportionment principles, which was not possible in regard to foreign corporations. It thus limited the *Japan Line* property tax domicillary rule to foreign-owned instrumentalities of commerce which were used exclusively as instruments of foreign commerce. As to interstate instrumentalities of domestic corporations, it affirmed the principle of full apportionment. Thus, *Japan Line* is totally irrelevant here.

Equally untenable is the argument of Mobil and its amicus that the principles affirmed by this Court in *Moorman* and reaffirmed in *Japan Line* applicable to domestic corporations engaged in interstate commerce are not controlling. In order to distinguish *Moorman,* they argue that there is a constitutional difference between this Court's refusal in *Moorman* to prescribe uniform apportionment formulae and for it to interpret the commerce clause to mandate specific allocation of dividend income to the commercial domicile. This Court in *Moorman* aptly noted that any constitutional prescription of a uniform apportionment formula was inexorably tied to other income attribution rules. *Moorman, supra,* at 437 U.S. 278-279. This fact was significant to its refusal to invalidate Iowa's single-sales-factor apportionment formula. Since, as a matter of fact, an apportionment rule and what is subject to apportionment are but two sides of the same coin, there is no difference between the two in a constitutional sense. In substance, then, Mobil and its amicus are requesting this Court to overrule *Moorman* by their back door approach to the fundamental constitutional question decided in *Moorman,* namely, whether this

Court of Congress, to the extend needed, should prescribe uniform division of income rules.[27]

Mobil and its amicus also assume (1) that the risk of multiple taxation is not constitutionally satisfied, as to domestic corporations, by reasonable apportionment rules; and (2) that taxation of dividends (and ostensibly all income from intangibles) solely by the commercial domicile better serves the alleged "multiple risk" commerce clause limitation than does reasonable apportionment rules. The first assumption is contrary to the express holdings of this Court. Irrespective of the otherwise validity of Mobil's "multiple risk" argument, this Court has uniformly held that any "multiple risk" in a constitutional sense is satisfied by reasonable apportionment standards. The second assumption is based on the unsubstantiated factual conclusion that differences in income attribution rules which are currently utilized by the states exposes dividend income to a risk of overtaxation rather than undertaxation. This is a surprising argument for Mobil to advance in this cause when the existing state attribution rules, however construed, result in substantial undertaxation of its income. Neither Mobil nor the C.O.S.T. members have asserted or sought to prove that they are exposed to a risk of multiple taxation under existing state attribution rules as applied to their dividends from their foreign subsidiary and affiliated corporations. They simply ask this Court to assume, as an abstract proposition, that differences in

[27]While Mobil and its amicus would limit *Moorman* to the validity of an apportionment formula, they ignore the fact that the question here involves the validity of Vermont's apportionment formula. The fact that they attack the apportionment formula result by reference to the apportionable income rather than by reference to the factors employed is a difference without substance. An apportionment formula may be invalid as applied to any taxpayer only if the interrelationship between the apportionable tax base and the apportionment formula produce an unconstitutional result. Thus, in *Butler Bros. v. McColgan, supra,* this Court considered both the reasonableness of the apportionment formula to assign income and the income base to which it was applied. (315 U.S. 507-508)

state attribution rules establishes a risk of multiple taxation as a matter of law. It has consistently refused to so speculate.

Mobil's argument that the Vermont tax is incompatible with federal policy regulating foreign commerce is subject to the same basic defects as its other "foreign commerce" arguments. There is absolutely no constitutional basis for Mobil and its amicus to conclude, based on *Japan Line,* that state taxation of income of domestic U.S. corporations, which is included in federal taxable income, must yield, by analogy, to complex, vaguely defined federal tax policies which have been formulated by the federal government solely for federal income tax purposes. State income taxation, whether in the context of income attribution rules or otherwise, is not the subject matter of either the Internal Revenue Code or federal tax treaties unless they expressly so provide. The sole issue here, then, "Whether this Court should constitutionally mandate a "separate accounting" domiciliary rule for state income taxation of dividends, to the exclusion of reasonable apportionment of this income by the application of unitary principles," is totally unrelated to any federal international policy concerns such as those involved in *Japan Line.* Also, Mobil has not established any federal policy which in any manner controls disposition of this case. Nor has it shown that any such assumed policy is better served by taxation of dividends from foreign subsidiaries by the state of commercial domicile rather than by apportionment to the states in which multinational corporations conduct their unitary business operations.

From the foregoing, the unitary principles embodied in the apportionment decisions of this court control disposition of this case. When properly applied to the facts and circumstances of this case, these principles indicate that this Court should affirm the decision below of the Supreme Court of Vermont.

ARGUMENT

I.

It is Readily Apparent That Mobil's Due Process Argument is Frivolous Inasmuch as Mobil Has Failed to Prove That the Vermont Apportionment Formula as Applied to Its Federal Taxable Income Does Not Reasonably Measure Its Income it Derived From Its Business Operations in Vermont or That the Dividends in Question and the Income Derived Therefrom Were Disassociated From Its Unitary Business Which It Conducted Both Within and Without Vermont, and Inasmuch as Vermont Can Take Into Consideration Out-of-State Properties, Activities and Income in Arriving at a Reasonable Apportionment of the Unitary Income of a Trade or Business.

The general due process standard applicable to an apportioned state income tax is stated as follows in *Northwestern States Portland Cement Co.*, 358 U.S. 450:

> "Nor will the argument that the exactions contravene the Due Process Clause bear scrutiny. The taxes imposed are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing State. These activities form a sufficient 'nexus between such a tax and transactions within a state for which the tax is an exaction.' *Wisconsin v. J.C. Penney Co., supra*, at 445. * * * The record is without conflict that both corporations engage in substantial income-producing activity in the taxing States. * * * As was said in *Wisconsin v. J.C. Penney Co., supra*, the 'controlling question is whether the state has given anything for which it can ask return.' Since by 'the practical operation of [the] tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred * * *' it 'is free to pursue its own fiscal policies, unembarrassed by the Constitution * * *' *Id.*, at 444." (358 U.S. at 464, 465)

As otherwise stated in *Moorman:*

> "The Due Process Clause places two restrictions on a State's power to tax income generated by the activities of an interstate business. First, no tax may be imposed unless there is some minimal connection between those activities and the taxing State. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 756. * * * Second, the income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing state.' *Norfolk & Western R. Co. v. Missouri*, 390 U.S. 317, 325." (437 U.S. 267 at 272-273)

Notwithstanding the fact that its activities in Vermont clearly exceeded any due process nexus requirements and notwithstanding the fact that the income subject to tax was reasonably related to Mobil's Vermont activities, Mobil attempts to attribute its gross dividends in question to out-of-state sources for due process purposes.

In so doing, it relies on two faulty premises, namely, (1) that Vermont is imposing an income tax on its dividend income and its stock holdings in its foreign subsidiary and affiliated corporations and its out-of-state activities in regard thereto; and (2) that the income derived therefrom is totally disassociated from and unrelated to its Vermont business activities and operations. Neither of these propositions is true. Furthermore, even if they were, so long as Vermont's apportionment formula attributed to Vermont only income that is reasonably related to a measure of Mobil's activities conducted within Vermont, there is no merit to Mobil's due process argument.

The fact that income or properties is included in the tax base subject to apportionment which by "separate accounting" would be attributable to out-state sources and activities has never triggered invalidation of an apportionment formula, so long as the taxpayer has not shown that the apportionment result reached extra-territorial values or income. *Butler Brothers v. McColgan*, 315 U.S. 501, (1942).

In contending that Vermont is attempting to tax its dividend income derived from out-of-state activities or sources, Mobil misconstrues the operative effect of the formula method of computing taxable income. In answering Moorman Manufacturing Co.'s argument that the Iowa single-sales-factor apportionment formula sought to tax income attributable to Moorman's manufacturing operations in Illinois, this Court stated in *Moorman:*

> "Since 1934 Iowa has used the formula method of computing taxable income. *This method, unlike separate accounting, does not purport to identify the precise geographical source of a corporation's profits;* rather, it is employed as a rough *approximation of a corporation's income that is reasonably related to the activities conducted within the taxing State.* The single-factor formula used by Iowa, therefore, generally will not produce a figure that represents the actual profits earned within the State. But the same is true of the Illinois three-factor formula. Both will occasionally over-reflect or under-reflect income attributable to the taxing State. Yet despite this imprecision, the Court has refused to impose strict constitutional restraints on a State's selection of a particular formula. See, *e.g., Underwood Typewriter Co.* v *Chamberlain,* 254 U.S. 113; *Bass, Ratcliff & Gretton v. State Tax Commission,* 266 U.S. 271; *Ford Motor Co. v. Beauchamp,* 308 U.S. 331. (Emphasis added; 437 U.S. 267 at 273)

Thus, Mobil's due process of law argument must be rejected because it has not sustained its burden of establishing that its stock holdings in question and its income therefrom were not related to and did not contribute to that part of its business which it conducted in Vermont.

Even if Mobil's argument that the stocks and dividends in question were totally unrelated to its unitary business operations which it conducted in part in Vermont, there is still a serious question as to whether there is any merit to its due process argument. For, Vermont does not seek to tax any of these dividends and

Mobil has not shown that the income attributed to Vermont by the apportionment formula was not "rationally related to 'values connected with the taxing *state'—Norfolk & Western R. Co. v. State Tax Comm'n,* 390 U.S. 317, 325." (*Moorman,* 437 U.S. 267 at 273)[28]

What Mobil and its amicus completely ignore, in both their due process and commerce clause arguments is that *unitary apportionment* principles—*not "separate accounting"* source principles—without exception, when a state seeks to tax integrated business operations which are conducted both within and without its borders. They argue that "separate accounting" rules are relevant within the limited context of the attribution of Mobil's dividend income in question and that apportionment unitary rules otherwise apply. This is an inappropriate, hybrid method of attributing income to either Mobil's Vermont income sources or income producing activities. If Mobil had "separately accounted" for its Vermont income or even for the income from its marketing business which it conducted in part in Vermont, the results would undoubtedly be entirely different that the results Mobil and its amicus contend for here.

As indicated in an article entitled "Recent Developments in State Tax Apportionment and the Circumscrip-

---

[28]In *Albany International Corp. v. Halperin,* 388 A.2d 901 (Me. 1978), the Supreme Court of Maine held that interest, capital gains, royalties and income derived from divisions of Albany International which conducted no activity in Maine were subject to apportionment if properly classified as business income under section 1(a) of UDITPA. Since it determined that an apportionment formula renders irrelevant the actual source of business income, the Maine Court refused to construe UDITPA to provide for the apportionment of only that portion of business income which was connected with business transacted in the taxing state. However, in the instant case, we need not cross this bridge. We premise our argument here on the proposition that Mobil has not sustained its burden of proof to establish either (1) that the income and stock in question were unrelated to its unitary business which it conducted in part in Vermont; or (2) that, apart from unitary principles, Vermont has attributed to Mobil's Vermont activities income which is not rationally related to income Mobil derived from its Vermont activities.

tion of Unitary Business," by Jerome R. Hellerstein, XXI National Tax Journal 487, 496:

> "The underlying justification for applying an apportionment formula to the overall tax base of a multistate business is that there exists a unitary enterprise being carried on in more than one state. The formula is a device for attributing to the taxing state its share of the overall tax measure that admittedly is attributable only in part to the state. This principle extends, at lease in a good many states, both to the branches of a single corporation and to subsidiaries and affiliated corporations that are a part of the enterprise. By applying the typical three factor formula, the property, receipts and payroll ratios of all branches, subsidiaries and affiliates are taken into account in determining apportionment ratios, which are then applied to the tax base of the entire business.
>
> [A]t the center of many of the cases, the crucial controversy has been the delineation of the contours of a unitary business." (Footnotes omitted)

Starting with the early utility property tax cases, this Court has uniformly upheld the apportionment of the entire properties, values or income attributable to a unitary business by an apportionment formula which has not been demonstrated by the taxpayer by clear and cogent evidence to tax extraterritorial income or values.

In *Adams Express Co. v. Ohio State Auditor,* 165 U.S. 194 (1896), this Court summarized the holdings of its prior utility property tax decisions pertaining to unitary reporting as follows:

> "As to railroad, telegraph and sleeping-car companies, engaged in interstate commerce, it has often been held by this Court that their property in the several states through which their lines or business extended might be valued as a unit for purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a portion of the whole fairly and properly ascertained might be taxed by the particular state, without violating any federal restrictions. [Cases cited.] The valuation was, thus, not confined to the

> wires, poles, and instruments of the telegraph company; or the roadbed, ties, rails and spikes of the railroad company; or the cars of the sleeping-car company, but included the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation." (165 U.S. 220, 221)

In the *Adams Express Co.* case, this Court went on to hold that all of the property of the express company which was used in its trade or business, including its intangible assets, were properly subject to apportionment for ad valorem property tax purposes. Furthermore, this Court there held that:

> "There is here no attempt to tax property having a situs outside of the state, but only to place a just value on that within. Presumptively, all the property of the corporation or company is held and used for the purposes of its business, and the value of its capital stock and bonds is the value of only that property so held and used.
>
> "Special circumstances might exist, as indicated in *Pittsburg C. C. & St. L. R. Co. v. Backus,* 154 U.S. 421, 443 [38: 1031, 1044, 4 Inters. Com. Rep. 677], which would require the value of a portion of the property of an express company to be deducted from the value of its plant as expressed by the sum total of its stock and bonds before any valuation by mileage could be properly arrived at, but the difficulty in the cases at bar is that there is no showing of any such separate and distinct property which should be deducted, and its existence is not to be assumed. It is for the companies to present any special circumstances which may exist, and, failing their doing so, the presumption is that all their property is directly devoted to their business, which being so, a fair distribution of its aggregate value would be upon the mileage basis." (167 U.S. 227)

This Court therefore concluded in the *Adams Express Co.* case that the total market value of the stock of the express company could be taken into consideration in valuing its properties within the taxing state, even

though its intangibles had a specific situs outside the taxing state at the "commercial domicile."

The foregoing conclusion of this Court in the *Adams Express Co.* case was vigorously opposed by the Company in a lengthy petition for hearing. The Court granted the rehearing and issued its opinion in accordance therewith in *Adams Express Co. v. Ohio State Auditor*, 166 U.S. 185 (1897). In the rehearing, the Express Company objected to including its intangible properties as part of the value subject to apportionment and taxed in part by the State. In holding that the intangible properties (which constituted three-fourths of the total value of the Express Company's capital stock) could be subject to taxation by the apportionment method, this Court reasoned as follows:

> "Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise; *or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter.* Every state within which it is transacting business and where it has its property, more or less, may rightfully say that the $16,000,000 of value which is (sic) possesses springs not merely from the original grant of corporate power by the state which incorporated it, or from the mere ownership of the tangible property, but springs from the fact that the tangible property it has combined with contracts, franchises and privileges into a single unit of property, and this state contributes to that aggregate value not merely by the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property.
>
> * * * * *
>
> "The burden of the contention of the express companies is that they have within the limits of the State certain tangible property, such as horses, wagons, and so forth; that tangible property is the only property within the State; that it must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them.
>
> "This contention practically ignores the existence of intangible property, or at least denies its liability for taxation." (166 U.S. 218)

It is thus clear that the *Adams Express Co.* cases and cases relied on therein clearly establish a unit rule or unitary concept for state tax purposes and permits a state to determine the instate privilege, property or income by reference to the total privileges, property or income of the multistate business if there is a unitary relationship between the instate activities or property of the business and its total activities or properties everywhere. They also establish the proposition that all of the properties or income of a unitary business are subject to a reasonable rule of apportionment. These cases also support the principle that an apportionment formula applied to the total value and properties of the unitary business is deemed to be reasonable in result and the burden is upon the taxpayer to establish otherwise. They also hold that the commercial domicile has no special claim to tax intangible properties or values connected with the unitary business and that all such values and properties, wherever located, are appropriately included in the tax base subject to apportionment.

The principles of these early "unit rule" cases were subsequently uniformily applied by this Court to corporate "net worth" franchise and income taxes. In the application of the "unit rule" to corporate franchise taxes, this Court in *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911) and *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939) upheld the apportionment of intangible properties and "going concern" values. It there recognized that the existence of intangible properties by large multistate-multinational corporations contributed substantially to their business which they conducted in various states. As there stated:

1. "Nor can it be justly said that investments have no real relationship to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige." (*Flint*, 220 U.S. 166)[29]

2. "In a unitary enterprise, property outside of the state necessarily affects the worth of the privileges within the state. Financial power inherent in possession of assets may be applied, with flexibility, at whatever point within or without the state the managers of the business may determine. For this reason, it is held that an entrance fee may be properly measured by capital wherever located. The weight, in determining the value of the intrastate privilege, given the property beyond the state's boundaries, is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state." (*Ford*, 308 U.S. 336)

This Court in *Ford Motor Co., supra*, held that its decisions in *Bass, Ratcliff & Gretton v. State Tax Commission, supra*, 266 U.S. 271 (1924) and *National Leather Co. v. Massachusetts*, 277 U.S. 413 (1927), were directly applicable.

In *Bass, Ratcliff & Gretton v. State Tax Commission, supra*, 266 U.S. 271 (1924), this Court stated:

> "In *Wallace v. Hines*, 253 U.S. 66, 69, it was recognized that a State, in imposing an excise tax upon foreign corporations in respect to doing business within the State, may look to the property of such corporations beyond its borders to 'get the true value of the things within, when they are part of an organic system of wide extent,' giving the local property a value above that which it would otherwise possess, and may therefore take into account property situated elsewhere when it 'can be seen in some plain and fairly intelligible way that it adds to the value of the (property) and the rights exercised in the State.' This is directly applicable to the carrying on of a unitary business of manufacturing and sale partly within and partly without the State."

[29] In *Flint v. Stone Tracy Co.*, the Court further held:

"There is no rule which permits a court to say that the measure of a tax for the privilege of doing business, where income from property is the basis, must be limited to that derived from property which may be strictly said to be actively used in the business. Departures from that rule sustained in this Court are not wanting." (200 U.S. 166)

The unit rule of taxation, which included a reasonable apportionment of intangible properties and intangible values, as developed in the *Adams Express Co.* cases was first applied to taxes on or measured by net income in *Underwood Typewriter Co. v. Chamblerlain, supra*. In the *Underwood* case, a tangible property apportionment factor was used to apportion to Connecticut manufacturing activities "* * * income upon which the corporation is required to pay a tax to the United States." (254 U.S. 117, 118) In challenging the constitutionality of the apportionment formula, the taxpayer contended that the net income included income from intangibles not connected with its Connecticut manufacturing business or properties. (254 U.S. 114-116) In disposing of the taxpayer's arguments, this Court focused its attention solely on the validity of the apportionment result.

Four years later, in *Bass, Ratcliff & Gretton, supra*, this Court held that the world-wide property and income of a British unitary enterprise were a necessary part of the apportionment computations in measuring the true value of its income attributable to New York. The taxpayer was found to be "a British corporation, engaged in brewing and selling Bass's ale" which it imported and sold in New York City and Chicago. (id., at p. 278) It had world-wide net income of $2,185,600, but "the Company, as reported to the United States, had no net income upon which it was subject to a federal income tax." (id., at p. 279) New York imposed a 3% tax which Bass paid under protest.

On appeal, Bass contended that the tax was imposed "upon a portion of its net income derived from business carried on outside of the United States * * *" (id., at p. 280) Bass argued further that the New York tax "* * * imposes a direct burden upon its foreign commerce in violation of the commerce clause of the Constitution." (id., at p. 280) This Court decisively rejected these contentions. It held that Bass "* * * carried on the *unitary* business of manufacturing and selling ale, in which its profits were *earned in a series of transactions* beginning with manufacture in England and ending in sales in New York * * *" (id., at p. 282) Having found Bass to be a unitary business operation, this Court affirmed that a fair measuring of taxes due the State required inclusion of:

> "* * * the property of such corporations beyond its borders to 'get the *true value* of the things within it, when they are part of an organic system of wide extent' giving the local property a value *above that which it would otherwise possess* * * * (id., at p. 282; emphasis added)

Again, in *Butler Bros. v. McColgan*, 315 U.S. 501 (1942), this Court applied the unit rule it had expressed in the *Adams Express Co.* cases, *supra*, and its observations in *Flint v. Stone Tracy Co.*, *supra*, and *Ford Motor Co. v. Beauchamp*, *supra*, in determining the validity of the apportionment result challenged in *Butler Bros.* It there found:

> "One who attacks a formula of apportionment carries the distinct burden of showing by 'clear and cogent evidence' that it results in extra-territorial values being taxed. See *Norfolk & Western Ry. Co. v. North Carolina*, 297 U.S. 682, 688, 56 S. Ct. 625
>
> * * * * *
>
> "At least since *Adams Express Co. v. Ohio*, 165 U.S. 194, 17 S. Ct. 305, this Court has recognized that the unity of use and management of a business which is scattered through several States may be considered when a State attempts to impose a tax on an apportionment basis.
>
> * * * * *

> "We cannot say that property, payroll, and sales are inappropriate ingredients of an apportionment formula. We agree with the Supreme Court of California that *these factors may properly be deemed to reflect 'the relative contribution of the activities in the various states to the production of the total unitary income,' so as to allocate to California its just proportion of the profits earned from this unitary business. And no showing has been made that income unconnected with the unitary business has been used in the formula.*" (Emphasis added, 315 U.S. 507-508)

In *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978), this Court stated:

> "The 'unitary business' techniques involves calculating a corporate taxpayer's net income on the basis of all phases of the operation of a single enterprise (*e.g.*, production of components, assembly, packing, distribution, sales), *even if located outside the jurisdiction.* The portion of that income attributable to activities within the taxing State is then determined by means of an apportionment formula. See, *e.g.*, *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920). (footnote 25, 434 U.S. 473; emphasis added)
>
> * * * * *
>
> "Individual States are free to employ the unitary-business standard. *Underwood Typewriter Co. v. Chamberlain, supra;* accord, *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n*, 266 U.S. 271 (1924)." (footnote 26, 434 U.S. 474)[30]

---

[30]As noted by the Supreme Court of California, in rejecting the appeal in *John Deere Plow Co. v. Franchise Tax Board*, 38 Cal.2d 214, 238 P.2d 569 (1951), appeal dismissed for want of a substantial federal question, 343 U.S. 939 (1952), formulary apportionment:

> " 'is not framed on the assumption that there must be uniformity of operating revenues and expenses in the relative functions of the various units contributing to the earnings of an integrated, multistate business' and concluded that the attack on the formula by proof of the higher costs and the less profitable nature of the California business misconceives the whole purport of the unit rule of assessment, which rests on the principle that 'where a business is unitary in character, so that its separate parts

In sum, since Mobil carried on substantial income-producing activities in Vermont for the years in question and there is no showing that Vermont has taxed any income not reasonably related and attributable to those activities, its due process argument lacks substance. As the above decisions amply demonstrate, the fact that the Vermont tax base, prior to apportionment, included dividend income from out-of-state properties and activities is totally irrelevant as is the fact of Mobil's "domicile." To the extent dividend income is attributable to out-of-state properties and activities, this is reflected in a determination of apportionable income and the apportionment factors.

II.

THE VERMONT APPORTIONMENT FORMULA AS APPLIED TO MOBIL'S FEDERAL TAXABLE INCOME IS VALID UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES SINCE IT DOES NOT SUBJECT MOBIL TO ANY UNCONSTITUTIONAL MULTIPLE TAXATION

A. Introductory Considerations

The unitary apportionment decisions of this Court set forth above in response to Mobil's due process of law argument and cases considered therein disposes of the substance of the commerce clause arguments of Mobil and its amicus.

In its commerce clause argument, Mobil attempts to circumvent the unequivocal and clear principles set forth in the apportionment cases of this Court on the assumption that these principles, as applied to the apportionable domestic income of domestic U.S. corporations, have no relevancy if there is included in apportionable income dividends that are received by these

---

cannot be fairly considered by themselves and the whole business in the several states derives a value from the unity of use, allocation of income upon a reasonable formula is properly sustained.'" (38 Cal.2d at 228, 238 P.2d at p. 577)

corporations from their foreign subsidiaries or affiliated corporations. They center this argument on *Japan Line* (which has no relevancy here) and their argument that *Moorman* and other income tax apportionment decisions of this Court, which are controlling precedent, have no application here since such decisions involved the validity of apportionment rules which are different than specific allocation rules. (App. Br., pp. 36-37).

Before responding specifically to Mobil's abstract circuitous arguments which purportedly lead to the conclusion that only the commercial domicile possesses jurisdiction to tax so-called "foreign source income" from intangible properties, it is important to note some of the fallacious assumptions which underlie these arguments:

(1) Mobil assumes that the inclusion of its gross dividends in the Vermont apportionable income tax base, constitutes a tax on such dividends, its stock from which they are derived or its activities in regard thereto. This, of course, is no more true in regard to its dividends than it is in regard to Mobil's income from its refining and producing properties, as well as its other properties and income-producing activities, which are located entirely outside of the state of Vermont.

What Mobil fails to realize is that net taxable income is an abstract concept, resulting from a host of operational events within a time frame designated as a tax year and that the taxable incidence of an income tax is the realization of income. This point is illustrated by a comparison of *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917), with *Peck & Co. v. Lowe*, 247 U.S. 165 (1918). While this court in *Crew Levick* invalidated a state gross receipt tax on receipts from goods sold in foreign commerce under the import/export clause, in *Peck* it rejected the argument that a tax on net income from export sales constituted a tax on exports. In so doing, it noted that an income tax:

> "* * * is not layed on the income from exportation because of its source * * * The tax is levied after

exportation is completed, after all expenses are paid and losses adjusted, and after the receipient of the income is free to use it as he chooses. Thus, what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins." (247 U.S. at 174-175)

Furthermore, the inclusion of any item of income, such as dividend income, in apportionable income, does not constitute taxation of that income or its underlying "sources" by the taxing state. As noted in *Moorman*, the use of an apportionment formula method of computing taxable income "* * * does not purport to identify the precise geographical source of a corporation's profits * * *" (437 U.S. 267 at 273)[31]

(2) Mobil assumes that the "source" of its gross dividends in question for income tax attribution purposes is the business operations of its overseas subsidiary and affiliated corporations. Inconsistently, it also assumes that

[31]In *N.Y. Ex Rel Cohn v. Graves, supra*, 300 U.S. 308 (1936), this Court upheld the income tax of New York which was imposed on income derived from sources without New York on the basis of residence. It there stated that the question presented was:

> * * * whether there is anything in the Fourteenth Amendment which precludes the state of New York from taxing the income merely because it is derived from sources * * * located outside the State." (300 U.S. 312)

In the course of its opinion, it held:

> A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits.
>
> * * * * *
>
> Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason income is not necessarily clothed with the tax immunity enjoyed by its source. (300 U.S. 313)
>
> * * * * *
>
> "The incidence of a tax on income differs from that of a tax on property." (300 U.S. 314)

this "source" of its dividend income is its "commercial domicile" in New York. It ignores the fact that a substantial "source" of this income may reasonably be attributable to its management, control and operations of a worldwide integrated petroleum and petroleum related business, including that of its foreign subsidiary and affiliated corporations, which it conducted in part in Vermont for the years in question. It further ignores (1) the fact that it is a distinct taxable entity from that of its subsidiary and affiliated corporations (*Moline Properties, Inc. v. Commissioner*, 319 U.S. 436 (1943)); and that Vermont does not purport to tax either the activities or income of Mobil's subsidiary and affiliated corporations. *In re Goodyear Tire and Rubber Co., Corporate Income Tax 1966, 1967 and 1968*, 133 Vt. 132, 335 A.2d 310 (1975).

(3) Mobil assumes that its gross dividends in question and its stock holdings in its foreign subsidiary and affiliated corporations do not constitute part of its operating properties and income, although presumably it utilizes these assets in its integrated business operations which it conducted in part in Vermont for the years in question. Without any factual foundation for it doing so, it arbitrarily excluded its gross dividends from its federal taxable income and asks this court to assume that such gross dividends (which for the year of 1972 amounted to 121% of Mobil's "federal taxable income") is not income from the operations of its trade or business, and therefore should be treated differently for constitutional purposes than its "operating income." (App. Br., footnote 23, pp. 36-37)

(4) Mobil assumes that the attribution of its gross dividends exclusively to the commercial domicile, avoids the risk of multiple taxation of the income of multistate-multinational corporations, to which the income is *exposed* by application of the *existing state income tax attribution rules*. However. there is nothing in the record to establish that, *under the existing state income tax attribution rules*, either Mobil or any members of C.O.S.T. or the N.A.M. are *in fact* exposed to any multiple taxation.

(5) Mobil assumes that diversity in apportionment and allocation rules create a risk of multiple taxation of its dividend income. Since there is no showing of any multiple taxation in fact under the present system, or that the state's present attribution rules would include in taxable income more than 100% of Mobil's income, there is no reason to conclude any risk of multiple taxation now exists or would be lessened by Mobil's "commercial domicile" argument.

(6) Mobil assumes that the risk of multiple taxation of any item of income which is included in apportionable income constitutes a risk of multiple taxation of its entire net income and that multiple risk exists if present state income tax attribution rules *plus any potential changes* would result in a multiple risk.

(7) Mobil assumes that New York, its commercial domicile, has the power to impose an income tax on all the dividend income in question. However, the record does not disclose that Mobil's stock holdings or the dividends derived therefrom are located and managed in New York. Mobil assumes that the legal fiction of "commercial domicile" alone establishes a "business situs" of the stocks and income therefrom in New York. No decision of this Court has so held in the context of any state tax.

(8) Mobil assumes that "investment" in stock of a foreign corporation and the receipt of dividends from that stock, constitutes engaging in "foreign commerce" by the owner of the stock within the preview of the commerce clause. It cites no decision in support of this novel proposition.

(9) Mobil assumes that multinational corporations have an easily ascertainable "commercial domicile" from which they conduct all of their worldwide activities, when as a matter of fact, they may have a different "commercial domicile" in reference to different aspects of their worldwide businesses. For example, in the instant case we do not know whether Mobil's foreign operations are conducted from its headquarters in New York, or elsewhere.

(10) Mobil assumes that the due process and commerce clauses alone prevent any duplicate income taxation by the states—either actual or potential. This Court has never so held.

(11) Mobil assumes that federal income tax attribution rules for federal income tax purposes control for state income tax purposes. Since federal jurisdiction is entirely different than the more limited state jurisdiction, the income tax attribution rules for federal income tax purposes cannot be applied at the state or local level since they are each grounded on distinct jurisdictional prerequisites.

From the foregoing it is evident that Mobil premises its abstract theoretical "foreign commerce" argument on a series of false premises and false assumptions which completely undermine the validity of its argument and that of its amicus. If Mobil's "foreign commerce" argument otherwise had any validity, it is obvious it has none apart from the foregoing false premises and false basic assumptions.

B. Japan Line Ltd. v. County of Los Angeles, 47 U.S. L.W. 4477 (April 30, 1979) Refutes, Rather than Supports, Mobil's "Foreign Source" Argument Inasmuch As this Court therein Affirmed the Principle of Full Apportionment to Prevent any Unconstitutional Multiple Taxation of Domestic Corporations Engaged in Interstate Commerce.

Contrary to the argument of Mobil and its amicus, there is nothing in the holding or reasoning of this Court in *Japan Line* that supports Mobil's position that the gross dividends it received from its foreign subsidiary and affiliated corporations can be constitutionally taxed only by the state of its commercial domicile.

Inasmuch as this Court carefully limited its decision in *Japan Line* to property tax on foreign owned, controlled and registered instrumentalities of commerce

used exclusively in international commerce, there is not the slightest reason to assume that *Japan Line* supports the domicillary rule here urged by Mobil and its amicus. This is particularly true when the reasons for applying the domicillary rule in *Japan Line* are totally absent from the case at bar.

This court in *Japan Line* limited the issue there considered to:

> "* * * whether instrumentalities of commerce that are owned, based, and registered abroad and are used exclusively in international commerce, may be subjected to apportioned property taxation by a state."

It declined to rule on this question in the context of foreign owned instrumentalities engaged in interstate commerce, or domestically owned instrumentalities engaged in foreign commerce. As to domestically owned instrumentalities engaged in interstate commerce, *Japan Line* affirmed the principle of full apportionment of movable tangible properties.

Nowhere in *Japan Line* is there the slightest hint that this Court's decision there would have any application to state taxation of domestic United States corporations engaged in interstate commerce. Furthermore, it expressly affirmed, as to such corporations and as to such commerce the applicability of formulary apportionment to eliminate any undue or unconstitutional multiple burden on interstate commerce.

Mobil and its amicus curiae center their entire commerce clause arguments in this case around *Japan Line* and on the assumption that the receipt of dividend income by a domestic corporation from foreign subsidiary and affiliated corporations constitutes "foreign commerce." They have neither analyzed how they arrive at their novel "foreign commerce" conclusion, nor cited case which would characterize a United States recipient of dividends from foreign "investments" as engaged in "foreign commerce" or which would characterize the inclusion of such dividend income in the apportionable

income tax base of a state as the taxation of "foreign commerce." In the instant case, all that Vermont is attempting to tax is Mobil's corporate income reasonably attributable to its operations and activities in Vermont. The fact that there is included in the apportionable tax base the dividends in question is not a tax on "foreign commerce." Vermont is no more imposing a tax on "foreign commerce" than was New York in *Bass, Ratcliff & Gretton, supra.* This fact alone destroys Mobil's reliance on *Japan Line* and its related "foreign commerce" arguments.

C. If a State Tax Is Fairly Apportioned to Reach Only Income Reasonably Attributable to the Taxing State, the Multiple Taxation Limitations of the Commerce Clause are Satisfied.[32]

In analyzing Mobil's "multiple risk" argument, it is significant that this court has never invalidated a properly apportioned state tax on the grounds that it exposed,

---

[32]In considering the decisions of this court pertaining to the "multiple risk" argument of Mobil, it is important to place such argument in its proper context. Net income is an abstract concept. Furthermore, what constitutes "net income" for state income tax purposes, though generally geared to federal taxable income, may vary significantly from state to state. In fact, some states do not tax net income at all. Any income tax liability may be subject to special tax credits to offset other tax liabilities of the taxpayer or to special deductions. Furthermore, any otherwise identifiable item of "net income" loses any identity when it is subject to apportionment to determine "net taxable income" which is attributable to and taxed by the taxing jurisdiction.

Under these circumstances, it is inappropriate to assume that any particular item of income is specifically subject to income taxation by any state where such income represents one element of "net income" which is subject to apportionment. In this case at bar, given the nature of the apportionable net income tax base (which commingles all items of income and expenses and other deductions), after the application of the Vermont apportionment formula, it is impossible to conclude that Vermont has *in fact* taxed any of Mobil's dividends. This is particularly true where all of the income is derived from an integrated unitary trade or business carried on in part in the taxing state and only a small fraction of that income (less than 2%) is taxed by Vermont.

either interstate or foreign commerce, to the risk of multiple taxation.

In *Moorman Mfg. Co. v. Bair, supra,* this court noted that the prevention of any duplicate taxation would require uniform national rules for the division of income, *both as to apportionment and specific allocation (separate accounting) rules.* It there stated:

> "The only conceivable constitutional basis for invalidating the Iowa statute would be that the Commerce Clause prohibits any overlap in the computation of taxable income by the states. *If the Constitution were read to mandate such precision in interstate taxation, the consequences would extend far beyond this particular case. For some risk of duplicate taxation exists whenever the States in which a corporation does business do not follow identical rules for the division of income.* Accepting, appellant's view of the Constitution, therefore, would require extensive judicial law making. Its logic is not limited to a prohibition or use of a single-factor apportionment formula. The asserted constitutional flaw in that formula is that it is different from that employed by a majority of the states and that difference creates a risk of duplicative taxation. *But a host of other division of income problems create precisely the same risk and would similarly rise to constitutional proportions* * * *
>
> "A similar risk of multiple taxation is created by the diversity among the States in the attribution of 'nonbusiness' income.
>
> "The prevention of duplicative taxation, therefore, would require national uniform rules for the division of income.
>
> * * * * *
>
> "Finally, it would be an exercise in formalism to declare appellant's income tax assessment unconstitutional based on *speculative concerns* with multiple taxation. Further, it is evident that appellant would have no basis for complaint if, instead of an income tax, Iowa had imposed a more burdensome gross receipts tax on the gross receipts from sales to Iowa customers." (Emphasis added; 437 U.S. 267 at 278-280)

In *Moorman,* in further response to alleged duplicate taxation there involved, this Court specifically found that "* * * *this record* does not establish the essential factual predicate for a claim of duplicate taxation." (437 U.S. at 276) After rejection of the assumptions on which duplicate taxation in *fact* was claimed by Moorman, this Court again reiterated that no duplicate taxation was established and that *"In any event on this record its existence is speculative."* (437 U.S. 267 at 276) In footnotes 10 and 11, this Court further noted:

> "Since Illinois did not adopt its income tax until 1970, there was no possibility of any overlap until that year. The alleged overlap in the three years following Illinois' enactment of an income tax was 34.38% in 1970, 34.51% in 1971, and 37.01% in 1972. Since there is no evidence in the record regarding the percentages of its total net income taxed in the other States in which it did business during those years, any claim that appellant was taxed on more than 100% of its total net income would also be speculative." (Ibid at 276)

If the commerce clause prohibits any risk of double taxation based on differences in the income attribution rules of the states rather than actual duplicative taxation, the *Moorman* case was wrongly decided. However, as applied to *properly apportioned state net income taxes,* potential risk has never been the constitutional standard and clearly is not the multiple risk standard in *Moorman.*

First Federal S & L Assn. v. State Tax Commission, supra, 437 U.S. 255 (1977) was handed down the same day as *Moorman.* One of the issues presented in *First Federal* was the risk of multiple taxation of the income of First Federal. The record below disclosed that approximately 35% of the income of the association for the years involved was derived from loans secured by real estate outside of Massachusetts (the taxing state). The appellant associations pointed out that this Court had recently in *John Hancock Mutual Life Insurance Company v. Brady,*

434 U.S. 804 (1977), dismissed the appeal of 342 So.2d 295 (1977) where the Supreme Court of Mississippi had held that Mississippi had jurisdiction to tax interest income of a foreign corporation based upon the fact that the income was derived from loans secured by recorded interests in real estate located in Mississippi. This Court disposed of this multiple risk argument by stating in a footnote

> "This argument is wholly speculative and unsupported by evidence in the record." (437 U.S. at 262)

Obviously, "evidence in the record" refers to actual, not potential, risk of duplicate taxation.

In *Northwestern States Portland Cement Co. v. Minnesota, supra,* 358 U.S. 450 (1959), this court clearly distinguished the multiple taxation question in the context of unapportioned gross receipts taxes, such as those involved in *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157 (1954) and *Adams Mfg. Co. v. Storen,* 304 U.S. 307 (1938) from the context of this question in apportionment cases. After referring to *Bass, Ratcliff & Gretton, Ltd. v State Tax Commission, supra,* 266 U.S. 271 (1924) and *Norfolk & W. R. Co. v. North Carolina,* 297 U.S. 618 (1936), this Court in *Portland Cement* noted:

> "These cases stem from the doctrine that *the entire net income of a corporation,* generated by interstate as well as intrastate activities, *may be fairly apportioned among the states for tax purposes* by formulas utilizing in-state aspects of interstate affairs." (358 U.S. 460)

It there then stated:

> "While the economic wisdom of state net income taxes is one of state policy not for our decision, one of the "realities" raised by the parties is the possibility *of a multiple burden* resulting from the exactions in question. *The answer is that none is shown to exist here.* This is not an unapportioned tax which by its very nature makes interstate commerce bear more than its fair share. As was said in *Central Greyhound Lines v. Mealey,* 334 U.S. 653, 661 (1948), 'it is interstate commerce which the State is seeking to reach and * * * the real question [is] whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears a special relation.' *The apportioned tax is designed to meet this very requirement and 'to prevent the levying of such taxes as will discriminate against or prohibit the interstate activities or will place the interstate commerce at a disadvantage relative to local commerce.' Id.,* at 670.
>
> *Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice. In practical operation, however, apportionment formulas being what they are, the possibility of the contrary is not foreclosed, especially by levies in domiciliary States.* But that question is not before us. It was argued in *Northwest Airlines v. Minnesota,* 322 U.S. 292 (1944), that the taxation of the entire fleet of its airplanes in that State would result in multiple taxation since other States levied taxes on some proportion of the full value thereof. The Court rejected this contention as being "not now before us" even though other States actually collected property taxes for the same year from Northwest upon "some proportion" of the full value of its fleet. *Here the records are all to the contrary. There is nothing to show that multiple taxation is present. We cannot deal in abstractions.* In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. This they have failed to do. (Footnotes omitted; emphasis added; 358 U.S. at 462-463)

In *General Motors v. Washington,* 377 U.S. 436 (1964), this Court stated and disposed of the multiple taxation issue there involved as follows:

> "A more difficult question might arise from appellant's claim of multiple taxation. *Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 434, 440 (1939). General Motors claims that some of its products taxed by Washington are manufactured in St. Louis where a license tax, measured by sales before shipment, is levied. See *American Mfg. Co. v. St.*

Louis, 250 U.S. 459 (1919). It is also urged that General Motors' Oregon-based activity which concerns Washington sales might afford sufficient incidents for a similar tax by Oregon. The Court touched upon the problems of multiple taxation in *Northwest Airlines v. Minnesota, supra*, at 295, but laid it to one side as 'not now before us.' Thereafter, in *Northwestern States Portland Cement Co. v. Minnesota, supra*, at 463, we held that '[i]n this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense.' Appellant has not done this. It has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax. Cf. *International Harvester Co. v. Evatt*, 329 U.S. 416, 421-423 (1947). *And further, it has not been shown that Oregon levies any tax on appellant's activity bearing on Washington sales.* In such cases we have refrained from passing on the question of 'multiple taxation,' e.g., *Northwestern States Portland Cement Co. v. Minnesota, supra*, and we adhere to that position." (377 U.S. 436 at 448-449)

Again, in *Standard Pressed Steel Co. v. Dept. of Revenue of Washington*, 419 U.S. 506 (1975), the Court declined to find any multiple taxation burden without an actual showing.

Notwithstanding the unequivocal holding of this Court (1) that the multiple risk standard of the commerce clause is satisfied by valid apportionment standards; and (2) that it will not engage in speculative reasoning to determine the existence of any multiple tax burden, Mobil argues that these cases simply stand for the proposition that there was no multiple risk in a constitutional sense. This argument begs the question. Since these decisions hold that, in a constitutional sense, hypothetical speculative burdens are not significant and that the commerce clause multiple burden standard is complied with by proper apportionment, Mobil's "constitutional sense" argument is a *non sequitur*.

In support of its multiple risk argument, Mobil relies heavily on the gross receipts cases (App. Br., pp. 16-18) and particularly Mr. Justice Rutledge's single opinion in *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944), *General Trading Co. v. State Tax Comm.*, 322 U.S. 335 (1944) and *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340 at 349. Mobil fails to note that Mr. Justice Rutledge's remarks, which it quotes on pages 17-18 of its brief, were made in regard to unapportioned sales or use taxes. He was there talking about duplicative taxation of gross receipts by the state of origin and the state of the market of the sales. In this opinion, he definitely distinguished between risk and actual multiple burdens and also concluded that apportionment resolves any undue commerce clause burden even as to gross receipts taxes.

He there aptly noted that:

"The real danger arises most obviously when both states levy the tax." (322 U.S. 358-359)

In the course of his opinion, he further stated:

"Either one tax must fall or, what is the same thing, be required to give way to the other by allowing credit as the Iowa tax does, *or there must be apportionment.*" (Emphasis added; 322 U.S. 360)

Mobil failed to consider the following statement in the controlling decision *Harvester Co. v. Dept. of Treasury, supra:*

"Much is said, however, of double taxation, particularly with reference to the Class D sales. It is argued that appellants will in all probability be subjected to the Illinois Retailers' Occupation Tax for some of those sales, since that tax is said to be exacted from those doing a retail business in Illinois even though orders for the sales are accepted outside of Illinois and the property is transferred in another State. *But it will be time to cross that bridge when we come to it.* For example, in the *Wood Preserving Corp.* case the State to which the purchaser took the ties might also have sought to tax the transaction by

levying a use tax. But we did not withold the hand of Indiana's tax collector on that account." (Footnote omitted, emphasis added; 322 U.S. 341, 348)

In further support of its multiple risk argument, on page 19 of its brief, Mobil quotes the following statement from footnote 17 of the opinion in *Japan Line:*

> "Because California's tax in this case creates multiple taxation in fact, we have no occasion here to decide under what circumstances the mere *risk* of multiple taxation would invalidate a state tax, or whether this risk would be evaluated differently in foreign, as opposed to interstate, commerce. Compare *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 276-277 (1978), and *Washington Revenue Dept.,* 435 U.S., at 746, with, e.g., *Central R. Co.,* 370 U.S., at 615; *Ott,* 366 U.S., at 175; and *Northwest Airlines,* 322 U.S., at 326 * * *" (Slip Op., p. 18)

None of the cases in the above quoted statement remotely suggest that a validly apportioned state tax creates unconstitutional multiple taxation based on the speculative power of another state to tax.

If, as this Court has repeatedly stated, the commerce clause does not call for mathematical exactness or the rigid application of a particular formula, Mobil's multiple risk argument in the context of the validly apportioned Vermont income tax as applied to Mobil conclusively resolves Mobil's "multiple risk" argument. Mobil assumes that what constitutes apportionable income and what constitutes a reasonable apportionment formula are related to entirely different constitutional problems. If some duplicative taxation in the application of apportionment formulae is constitutionally permissible, absent congressional legislation, there is no reason why the same standard is not applicable to other income attribution rules, including specific allocation.

In any event, the controlling fact here is that this Court has never determined, as a hypothetical proposition, whether another state has jurisdiction to tax, irrespective of what risk standard is required by the commerce clause.

It has consistently refused to engage in any speculative reasoning or analysis of either the commerce clause or a taxpayer's exposure to multiple taxation in deciding the commerce clause question before it. What Mobil is asking this Court to do in this case is to speculate as to whether or not, under the circumstances of this case, New York is entitled to attribute to itself, based on the legal fiction of commercial domicile, almost all of Mobil's entire net income for the years in question. Resolution of this question, within the framework of judicial proceedings, is proper only if and when New York seeks to exercise such jurisdiction and its power to do so is appropriately challenged by a taxpayer. This is particularly true when this Court has never before considered this constitutional issue, that is, the right of the "commercial domicile," solely on the basis of the legal fiction "commercial domicile," to tax the entire income from intangibles derived by the taxpayer from its unitary business operations. It should do so only in the context of an actual case or controversy.

In this connection, we are confident that if New York attempted to exercise such jurisdiction, Mobil would advance various factual and legal propositions to indicate that the legal fiction of commercial domicile should not be so applied to it.

In further regard to Mobil's multiple risk argument, it is significant to examine how it arrives at its conclusion that it is exposed to a risk of multiple taxation. The reasoning of Mobil in support of its "multiple risk" commerce clause argument is based on a mixture of fact and fantasy. Mobil argues that the *fact* that it is not subject to multiple taxation is not significant in a constitutional sense. It claims that any risk of multiple taxation must consider any *potential changes* in the *existing* attribution rules and thus, since New York could change its attribution rules to tax dividends in full based on "domicile," there is a potential risk of multiple taxation. Thus, Mobil argues that if a *combination of existing attribution rules plus any potential changes in the existing rules* could result in a risk of multiple

taxation, this triggers invalidity of any apportionment rule under the commerce clause. In other words, unconstitutional risk of multiple taxation exists if the presently employed attribution rules *plus* any *potential* changes exposes dividends to a *risk* of multiple taxation. Under such a constitutional standard, even if all of the states employed identical attribution rules to dividend income, these rules would not pass constitutional muster *if* any state could constitutionally change its rules to attribute more dividend income to it than under its existing uniform rule.

In any event, irrespective of whether prior decisions of this Court, as an abstract proposition, have adhered to the risk versus actual multiple burden test in analyzing commerce clause questions, there can be no argument with the proposition that this Court has uniformly found that a reasonably apportioned net income tax places no prohibitive burden upon interstate commerce in a constitutional sense. As noted in *Moorman*, this is equally true in regard to uniform allocation rules as it is in regard to uniform apportionment rules. In short, this Court has left any such considerations to the political processes of the respective states and the Congress. Thus, the multiple risk argument of Mobil and its amicus is without merit within the context of this case.

D. In Conformity with the Dual Purposes of the Commerce Clause to Require Interstate Commerce to Pay Its Way and to Prevent Discriminatory Taxation of Interstate and Foreign Commerce, the Commerce Clause Has Been Properly Interpreted by this Court to Preclude Only Undue Multiple State Taxation in Fact.

Mobil is here contending for what amounts to an exemption of substantially all of its net income from state income taxes based on its "multiple risk" argument. It argues that this result is justified because its claimed income tax immunity is attributable solely to New York's

policy in not exercising its power to tax dividends based on the legal fiction of "commercial domicile." Assuming that this is so, the question remains as to whether the purpose of the commerce clause is better served by interpreting it to conform with the claimed exemption of Mobil rather than in support of the legitimate power of Vermont to include Mobil's dividends in apportionable income. Clearly, Vermont must do so if it can effectively impose its corporate income tax commensurate with the benefits it has afforded Mobil relative to the income producing activities conducted by Mobil in Vermont. Also, Vermont must do so if it is to apply its corporate income tax in a manner that does not subject Mobil's instate competitors to discriminatory taxation.

This Court has repeatedly held that the commerce clause is not to be interpreted to grant interstate businesses a tax-free ride. As stated by this Court in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964):

> "We start with the proposition that '[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.' *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). 'Even interstate business must pay its way,' *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252, 259 (1919), as is evidenced by numerous opinions of this Court. (377 U.S. at 439)
>
> * * * * *
>
> "A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation." (377 U.S. 440)

Likewise, this Court has repeatedly held that the commerce clause was designed to protect commerce from discriminatory tax burdens. As stated in *Northwestern States Portland Cement Co. v. Minnesota, supra*, 358 U.S. 450 (1959):

> "Nor may a State impose a tax which disciminates against interstate commerce either by providing a direct commercial advantage to local business (cases cited) or by subjecting interstate commerce to the burden of 'multiple taxation' (cases cited)." (358 U.S. 458)

These dual constitutional requirements can best be implemented by this Court in construing the commerce clause to prevent any undue burdens on commerce as a matter of fact. In the instant case, if there is no undue burden imposed on Mobil as a *matter of fact*, should this Court nevertheless conclude that it exists *as a matter of constitutional law* by speculating on the power of New York to tax the dividends of Mobil in full by application of the legal fiction "commercial domicile"? When the competing demands of the states and the commerce clause are weighed in the balance, there is no reason why an undue burden *in fact* should not constitute the constitutional standard. Until this occurs, interstate commerce is not disadvantaged taxwise by the states.

This interpretation of the commerce clause is supported by practical considerations. It would avoid the unreasonable consequence—almost complete state income tax immunity—which Mobil and its amicus seek in this case, based on abstract constitutional and factual considerations. It eliminates any constitutional guessing pertaining to the hypothetical and speculative taxing powers of other states or countries in relation to the facts and circumstances of any particular taxpayer. It represents a construction of the commerce clause in conformity with business, economic and political reality. It places constitutional substance over constitutional form. It also enables this Court to interpret commerce clause limitations on state taxing powers within the context of actual controversies between the states and taxpayers directly affected by such decisions.

In arguing what it characterizes as "the propriety of the risk test" (App. Br., pp. 22-23), Mobil concludes:

> "We submit that the potential for multiple taxation, rather than the actuality of multiple tax burdens, is the proper test of the constitutionality of state taxes under the commerce clause." (App. Br., p. 23)

What Mobil fails to note is that the *potential* for multiple taxation under the facts and circumstances of this case is only speculative. It does not urge that there is the slightest possibility that New York will tax its dividends on the basis of the fiction of "domicile." In fact, Mobil and its amicus curiae urge this Court to accept this fiction, not to prevent potential multiple taxation, but to prevent any taxation by the states of what amounts to in many instances to all or substantially all of their net income. Thus, Mobil and its amicus curiae are asking this Court to interpret the commerce clause to preclude any *theoretical constitutional risk* of multiple taxation based on an alleged comparison of the *existing attribution rules* plus *any potential changes* in such rules. Furthermore, this Court has already decided any policy issue pertaining to multiple risk under the commerce clause that could possibly be involved in this case.[33]

While Mobil has limited its argument in this case to so-called dividends from "foreign sources," it is readily apparent that its argument and that of its amicus, in principle, cuts to every aspect of what constitutes the taxable income of multinational corporations for state income tax purposes. Here, Mobil is asking this Court to constitutionally mandate an exclusion from federal taxable income for Vermont income tax apportionment purposes. If this Court is empowered under the commerce clause to determine the appropriate attribution rule for any class of income, there is no reason to suppose that it is

---

[33]As indicated *supra*, at pages 55-61, Mobil and its amicus curiae completely ignore the fact that under repeated decisions of this Court fairly apportioned net income taxes have been held to comply with the multiple taxation requirements of the commerce clause. Therefore, Mobil's potential versus actual multiple tax burden argument, has absolutely no significance here.

not also empowered to do so for any other class of income. This is particularly true in regard to income from all forms of intangible properties.

The type of problems this Court would be enmeshed in unless it held that the constitution requires full apportionment of all unitary income of a unitary trade or business is set forth on pages 197-224 of Volume 1 of the "Willis Report."[34]

For example, as indicated therein on pages 204-205, interest attribution rules pertaining to interest income may involve apportionment or allocation. Allocation rules applicable to interest income may include the legal domicile, commercial domicile, principal place of business, business situs of the interest-bearing asset, location of the payor of the interest or on the basis of actual situs of the asset, as well as various combinations of the foregoing. In regard to dividends, the Willis Report at page 206 of Volume 1 notes that with only a few exceptions "the rules governing the specific allocation of dividends are the same as the rules for the allocation of interest income."

Furthermore, if uniform attribution rules is required concerning assigning of income under the commerce clause, there is also involved, as indicated by the Willis Report (Ibid., pp. 220-224), special problems pertaining to offsetting expenses. For example, in the instant case, if this Court should conclude that Vermont lacks the power to include in apportionable income the dividends in question, is Vermont entitled to offset interest and various overhead, management, research and other expenses resulting from activities concerning the operations of its foreign subsidiary and affiliated corporations, etc.? If so, in accordance with what standards or criteria? These considerations led the Willis Committee to recommend full apportionment of the entire net income of corporations. They have likewise led the states in the same direction so that now the states all generally require the apportionment of all business income.

[34]State Taxation of Interstate Commerce, Report of Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary House of Representatives, Vol. 1 (H.R. 1480, 88th Cong. 1964)

However, "net taxable income" and apportionment and allocation rules applied to "net income" are not necessarily uniform and any rigid constitutional requirement, such as specific allocation of dividend income to the commercial domicile, has a ripplying effect. It creates a whole new series of income tax base and attribution problems. For example, if Vermont and other states cannot include "dividends" in apportionable income but can include all "operating income," this immediately raises a whole series of problems in determining what truly constitutes "dividend income" versus "operating income" for constitutional purposes. The fact that Mobil's dividends are labeled by it as income from "investments" in stock rather than from its worldwide unitary business operations should not control for constitutional purposes. Furthermore, specific allocation of dividends would augment the need for the states to resort to worldwide "combined reporting" or alternatively to attempt by "separate accounting" to unravel complex interrelated transactions pertaining to a unitary trade or business conducted by a U.S. parent and its foreign subsidiary and affiliated corporations which involve the difficult and vexing problems associated with section 482 adjustments under the Internal Revenue Code.[35]

[35]For a discussion of Section 482 problems and alternative approaches, such as "combined reporting" see the Note, Ibid., footnote 25, p. 20.

The type of income attribution problems associated with United States domestic parent corporations in their dealings with their foreign subsidiary and affiliated corporations is illustrated by the California Board of Equalization *Appeal of Texaco, Inc.*, decided January 11, 1978 discussed *supra* in footnote 25. The nature of these problems is also illustrated by an example involving Delaware and Getty Oil. As reported in *Tax Notes*, Sept. 1 and October 20, 1975, for several years in the 1970's Getty did not report any taxable income to Delaware, where it has substantial properties, payroll and investments. Getty

Thus, while Mobil and its amicus purport to deal with a very narrow issue in this case in an abstract manner, this case involves many more ramifications than the constitutionality of an apportionment formula. This Court was aware of this fact in *Moorman*. It noted that *Moorman* posed, in substance, a whole spectrum of income base and attribution problems in addition to the narrow question of the validity of a particular apportionment formula. It therefore left resolution of this, *as well as necessarily related attribution and base questions* to the political arena for resolution.

We thus fail to see any merit in the argument of Mobil and its amicus that the multiple risk standard should be applied in the instant case to invalidate Vermont's reasonable apportionment of Mobil's income to its Vermont activities.

E. There is No Merit to Mobil and its Amicus Curiae's Argument that So-Called "Risks of Multiple Taxation" of Dividend Income is Reduced by Substituting the "Commercial Domicile Fiction" in Place of the Existing Income Attribution Rules.

On pages 23-37 of its brief, Mobil sets forth various abstract arguments pertaining to what it captions as the risks of multiple taxation of dividends from foreign commerce. This argument is premised on the unsupportable proposition that Vermont, in including Mobil's dividends from its foreign subsidiary and affiliated corporations in apportionable income, is somehow imposing its income tax on "foreign commerce" in contravention of this Court's decision in *Japan Line*. However, as heretofore indicated on pages 53-55 *supra*, *Japan Line* has no application to division of income attribution rules

apparently achieved this remarkable result through its transfer pricing arrangements with its subsidiaries and affiliates. Any such tax consequences are compounded here if the argument of Mobil and its amicus are controlling.

pertaining to interstate commerce of domestic United States corporations since Vermont is not taxing Mobil's "foreign commerce."

Assuming arguendo that Vermont is taxing "foreign commerce," still, there is no showing by Mobil that its income in question is subject to any potential multiple taxation under the existing state income tax attribution rules. By an abstract theoretical analysis, Mobil attempts to demonstrate that differences in apportionment rules of the states result in duplicate taxation (App. Br., pp. 27-28, footnote 12). Although Mobil asserts that "the potential for double taxation by the twenty-seven states — in all of which Mobil, like many other multinational corporations do business — is manifest from the diversity in the formulas employed by those states" (App. Br., p. 27) Mobil fails to indicate, *as to it* why this is so. Nor is there any information concerning the impact of such diversity on the "many other multinational corporations" which are allegedly similarly situated to Mobil.

In substance, then, without any proof whatsoever, Mobil and its amicus curiae ask this Court to accept as a fact, in interpreting commerce clause limitations on state taxing powers, that diversity in state apportionment rules and potential for double taxation are one and the same. Nothing could be further from the truth. As indicated in Jerome R. Hellerstein's article, *"State Taxation Under the Commerce Clause: An Historical Perspective,"* 29 Vand. L. Rev. 335, 347 (1976):

> "Diversity in state or local apportionment, which often results in undertaxation of an enterprize, is * * * unfair to the governments and oppressive to competitive intrastate business."

The validity of this statement can be demonstrated by a cursory examination of those differences relied upon by Mobil in footnote 12 on page 27-28 of its brief to "prove" a risk of multiple taxation under existing apportionment rules. There, Mobil first relies on the fact that in some states the taxpayer has the option to use either UDITPA

or the "traditional formula." The fact that a taxpayer has this option is a difference that can only lessen, not augment, a taxpayer's risk of multiple taxation.

Next, Mobil relies upon the variation and the weight given the apportionment factors employed by the states and some variations among the states in implementation of the same factors. While Mobil points to differences in the sales and property factors, there is no indication as to whether these differences result in a substantial gap rather than overlap in the attribution of apportionable income. It is further obvious that any potential risk of multiple taxation of dividends under the present system would have to take into consideration what dividends are actually subject to tax by the states. This we do not know from Mobil's analysis.

Appendix F attached to Mobil's brief (App. Br., p. 37a-39A) lists "only jurisdictions which include foreign source dividends, in part or in whole, in the tax base." The table refers to an undisclosed item captioned, "All Taxable Dividends." We do not know to what extent and on what basis dividends are taxable by any state. The table is otherwise unreliable.

California Montana, Idaho, Kansas, Oregon and Colorado employ worldwide combined reporting which eliminates the intercorporate dividends of the combined corporations which conduct an integrated unitary business. This presumably would include all the dividends in question. Furthermore, California has adopted UDITPA which requires the apportionment of dividends to the extent they constitute "business income" as defined therein, the applicability of which, due to California precedent, is currently in litigation in California. The *Times Mirror Company v. Franchise Tax Bd.*, Los Angeles Superior Court No. C1723731; *In the Matter of the Appeal of Standard Oil Company of California*, Calif. Bd. of Equal.

Also, the table erroneously indicates that Arizona, Louisiana, Minnesota, Mississippi, Oklahoma and South

Carolina, in addition to California, allocate all taxable dividends to the commercial domicile of the payee corporation.

Louisiana law provides for the specific allocation of dividends and profits from sales or exchanges of intangible property to the state in which the securities or credits producing such income "shall have their business situs." If they have not acquired a business situs, income from such properties of a corporation are then allocated to the commercial domicile. The Louisiana law further provides that dividend income from controlled corporations (50% or more of voting stock) having a situs in Louisiana "shall be allocated to the state or states in which is earned the income from which the dividends are paid * * *" (La. Rev. Stat. Ann. § 243, P.H. State Income Tax Reporter, Louisiana ¶ 12,644)

Minnesota law requires the apportionment of income from intangible properties where the property is employed in a unitary business carried on partly within and without Minnesota. (Minn. Stat. § 290.17, P.H. State Income Tax Reporter, Minnesota ¶ 94-06 & ¶ 94-067a). Even where the income was not associated with the unitary business, the Supreme Court of Minnesota held that dividends could not be taxed by Minnesota by application of the legal fiction of "commercial domicile" since it interpreted prior decisions of this Court to permit taxation of intangibles by the "commercial domicile" only if they acquire a "business situs" at the commercial domicile. *Marshall-Wells Co. v. Commissioner of Taxation*, 220 Minn. 458, 20 N.W.2d 92 (1945).[36]

[36]The foregoing references to Minnesota law are consistent with its decisions in *Montgomery Ward & Co. v. Commissioner of Taxation*, 276 Minn. 479, 151 N.W.2d 294 (1967) and *Great Lakes Pipeline Co. v. Commissioner of Taxation*, 272 Minn. 403, 138 N.W.2d 612 (1965) wherein it applied the unitary concept to determine what constituted apportionable interest income.

Mississippi law likewise provides for the apportionment of all business income, including that from intangible properties, if specific allocation or "separate accounting" is found impossible because of the unitary nature of the taxpayer's instate and out-of-state business operations (Miss. law, § 27-7-23 as amended by Ch. 475, Laws of 1978; P.H. State Income Tax Reporter, Mississippi § 92-532). Mississippi Reg. 1.27-7-23(7) provides for apportionment of federal taxable income, including interest income and dividends from a unitary trade or business.

Oklahoma law in turn provides only for the specific allocation of income from intangibles "which is not a part of business carried on within and without the state of a unitary character." Intangible income of a non-unitary character is allocated to the business or commercial situs or if there is no such situs, apart from the commercial domicile, then to the "commercial domicile." (Okla. Stat. Tit. 68, § 2358A; P.H. State Income Tax Reporter, Oklahoma ¶ 12, 711)

Arizona law specifically states that "Income from business carried on partly within and partly without this state shall be apportioned in such a manner as is fairly calculated to apportion such income among the states or countries in which such business is conducted." It contains no specific provision allocating income from dividends to the commercial domicile and provides for offsetting any interest expense if interest or dividend income is specifically allocated. (Ariz. Rev. Stat. § 43-135(g); P.H. State Income Tax Reporter, ¶ 12, 738.22) The income tax regulations of Arizona specifically provide for full apportionment of income from a unitary trade or business. Only income not connected with the unitary business is subject to allocation (Regulation § 135-8(b); P.H. State Income Tax Reporter, Ariz. ¶ 11,289.55)

North Carolina law employs the UDITPA definition of "business income" and "nonbusiness income" (N.C. Gen. Stat. § 105-130.4(1) and (5)) and provides for the specific allocation of dividend and other income from

intangibles only to the extent such income is "nonbusiness income." It further provides for apportionment of all business income of corporations (except public utilities and some excluded corporations) by the general three-factor UDITPA apportionment formula (N.C. Gen. Stat. § 105-130.4(i)). Nonbusiness dividends from a corporation in which the payee corporation owns 50% of the payor corporation is allocated to the state if the payor corporation is subject to tax in the state based on that portion of the payor corporation's income taxable in the state (N.C. Gen. Stat. § 150-130.4(f)). The North Carolina statutory pattern, following the unitary concept, accords with the holding in *Maxwell v. Kent-Coffey Mfg. Co.*, 204 N.C. 365, 168 S.E. 397 (1933), aff'd 291 U.S. 642 (1934).

Thus, Mobil has failed to substantiate its argument and that of its amicus that the present state income tax treatment of so-called "foreign source dividends" result in *any risk or potential multiple taxation of such dividends* — assuming the correctness of the basic assumptions on which such an argument is structured. In fact, an examination of the present state income tax system overwhelmingly supports the proposition that no state relies *solely* on the legal fiction of "commercial domicile" for the attribution of dividend income or other income from intangibles. To the contrary, there appears to be an almost unanimous consensus among the states that all unitary income of a unitary trade or business should be divided by reasonable apportionment rules.

F. There is No Valid Political, Economic or Business, or Precedental Validity to the Argument of Mobil and its Amicus Curiae that the Commerce Clause of the United States Should be Interpreted to Permit Only the State of the Taxpayer's "Commercial Domicile" to Tax Dividends or Any Other Intangible Properties Under the Facts and Circumstances of this Case.

On pages 29-37 of Mobil's brief, it seeks to justify the broad tax immunity that it and its amicus curiae seek in this case under the following headings of its brief:

1. History and the Judicial Decisions Support Taxation of Dividends Only by the State of Commercial Domicile. (App. Br., pp. 29-30)

2. Fiscal Policy Considerations Underlying Jurisdiction to Tax Justify Taxation of Dividends Solely by the State of Commercial Domicile. (App. Br., pp. 30-34)

3. Commerce Clause Decisions of this Court Support Limitation of the Taxation of Foreign Source Dividends to a Single State to Avoid Multiple Taxation. (App. Br., pp. 34-36)

4. Affirmation of the Sole Power of the State of Commercial Domicile to Tax Foreign Source Dividends is not Inconsistent With the *Moorman* Case. (App. Br., pp. 36-37)

We will here respond to this argument of Mobil by first considering the *Moorman* case; secondly, policy considerations involved in limiting state income tax jurisdiction to the commercial domicile; thirdly, the history and judicial decisions pertaining to taxation of dividends; and lastly, Mobil's argument that decisions of this Court support its exclusive "commercial domicile" jurisdictional argument.

1. Moorman and Cases of Like Import Control the Disposition of this Case Inasmuch as There is Here Involved Only the Question of the Constitutionality of the Reasonable Income Tax Attribution Rules of the Vermont Corporate Income Tax as Applied to the Unitary Income of a Unitary Business Conducted in Part in the State of Vermont.

The issue before this court in *Moorman* was the constitutionality of the Iowa single-sales-factor income tax apportionment formula within the purview of the commerce and due process clauses of the United States

Constitution. The taxpayer there (Moorman Mfg. Co.) was engaged in interstate commerce and sold products in Iowa which it manufactured in Illinois. Moorman paid income tax to Iowa on its net income attributable to Iowa by the sales factor apportionment formula and Iowa's specific allocation rules.

Significant to this case, this court rejected the arguments of Moorman that an apportionment formula imposed an income tax on any specific "income" sources or transactions. As discussed *supra* at pages 56-57, it further rejected the argument that it was its function, under the commerce clause, to prescribe uniform national rules for the attribution of an income tax base among the respective states. In discussing its role under the commerce clause, it did not differentiate between those states attribution rules which are embodied in apportionment formulas and those rules which are embodied in other division of income rules, such as "separate accounting" and "specific allocation." In fact, it was keenly aware of the interrelationship and interdependence of all state income tax attribution rules and for that reason did not isolate its consideration of the validity of the Iowa apportionment formula apart from other attribution rules. It noted a potential inconsistency if it were to deny Iowa the constitutional authority to apportion income by a sales distination factor formula and permit another state, within constitutional limitations, to impose a gross receipts privilege tax on all instate receipts connected with instate activities.

In contending that *Moorman* is not controlling here as to whether or not this Court should interpret the commerce clause to require specific allocation (separate accounting) of dividends to the "commercial domicile" for state income tax division of income purposes, Mobil and its amicus completely ignore the true significance of the *Moorman* decision. In addition, they completely ignore the fact that this case, like *Moorman*, specifically involves the validity of an apportionment formula. Mobil is asking this Court here to declare an apportionment formula unconsti-

tutional for reasons not distinguishable from those advanced by Moorman in the *Moorman* case.

While Mobil states in its brief that:

> A compelling factor in *Moorman* was this Court's "unwillingness to strike down the Iowa apportionment formula was that the prevention of duplicate taxation would require national uniform rules for the division of income (437 U.S., at 279; App. Br., p. 32),"

it necessarily concludes that the assignment of income to the commercial domicile would not constitute a judicially prescribed national uniform rule for the division of income. This argument is absurd on its face! If attributing income from intangible properties solely to the commercial domicile, for state income tax purposes, is not a uniform national rule for the division of income, then nothing is!

Thus, *Moorman*, contrary to Mobil's argument and the argument of its amicus, is controlling precedent here since this Court in *Moorman*, in refusing to invalidate Iowa's single-sales-factor on the ground that it was not its function to prescribe uniform national rules for the division of income for state income tax purposes, necessarily decided that it would not prescribe a uniform national rule for the specific allocation of income.[37]

2. **Fiscal Policy Considerations, as Well as History, do Not Support Exclusive Taxation of Dividend Income and Other Intangibles for State Income Tax Purposes by the Commercial Domicile But Rather Supports Apportionment of Dividends and Other Intangibles to the Extent that Such Intangible Properties and the Income Derived Therefrom Constitute Integral Parts of the Integrated, Unitary Business of the Taxpayer Which is Conducted in Part in the Taxing State.**

[37]Furthermore, there is no basis for construing the commerce clause any differently in the context of the prescription by this Court of uniform apportionment rules than in the context of its prescription of uniform allocation rules. All state income tax attribution rules are necessarily intertwined. For constitutional purposes, they are not distinguishable. This fact was specifically noted and discussed by this Court in *Moorman*. What Mobil and its amicus ask this Court to do here is what it specifically refused to do in Moorman, that is mandate a uniform constitutional rule for the division of income.

Mobil, in arguing that fiscal policy considerations underlying jurisdiction to tax justify taxation of dividends solely by the state of "commercial domicile," premises this argument on the property tax situs domicillary rule enunciated by this Court in *Wheeling Steel Corp. v. Fox*, 298 U.S. 193 (1936) and *First Bank Stock Corp. v. Minnesota*, 301 U.S. 234 (1937). It also bases this argument on its due process argument that its "investments" in stocks of its subsidiary and affiliated corporations were unrelated to its worldwide petroleum and petroleum related business which it conducted in Vermont and in every other state in the United States and the District of Columbia.

It further predicates this argument on the assumption that it obtained this dividend income from its "business and activities as a holding and investment company" which are not connected with its Vermont activities. In regard to this unsubstantiated assertion, the record is entirely silent as to what "holding and investment company" activities were conducted by Mobil in New York or elsewhere to justify their taxation in full by what Mobil proffered in the record in this cause as its "commercial domicile." In fact, there is no claim in the record in this cause that *any activity of Mobil concerning any of its dividends in fact took place in New York*. Thus, it is not known what activities Mobil conducted or where it conducted those activities to which it would attribute the great bulk of its federal taxable income for the years in question. Furthermore, as indicated in Exhibit 8 (A75-A78) and table, *supra*, p. 23, substantially all of Mobil's dividends in question were derived from three wholly-owned subsidiary corporations and Mobil's 10% interest in ARAMCO. Yet, the record is barren as to the nature of their business activities and Mobil's activities in regard

thereto. Thus, on the basis of undisclosed and mythical facts pertaining to Mobil's "investment" activities [which were fully expensed and apportioned, including any sales or services of Mobil connected with its subsidiaries and affiliated corporations and their subsidiaries and affiliates, for Vermont income tax purposes], this Court is asked in substance to attribute all intangible income exclusively to the legal fiction of "commercial domicile" as a reasonable interpretation and application of the commerce clause restrictions on state taxing power.[38]

Wheeling Steel Corp. v. Fox, supra, constituted a landmark decision in upholding the power of the state of the "commercial domicile" to subject intangible properties to unapportioned property taxation. It upheld West Virginia's power to tax the intangibles there involved (bank deposits and accounts receivable) on the basis of the "commercial domicile" rule only after an extensive

[38]In advancing this argument, Mobil in footnote 19 on page 32 of its brief, attempts to sidestep the legal domicile's jurisdiction to tax because its commercial and legal domicile are both in New York. It purports to also sidestep the "business situs" issue by asserting that "the business situs question, however, does not arise in the case at bar, since Mobil's stocks in the foreign corporations whose dividends are at issue in this case had no business situs in Vermont." (App. Br., footnote 19) Mobil, in footnote 19, recognizes that "if intangibles have become an integral part of a business carried on in a state, they acquire a 'business situs' and may be taxed in that state." In so arguing, it assumes that "business situs" for income attribution rules within the context of an apportionment formula is limited to specific allocation property tax situs rules. Mobil fails to note (1) that all of the decisions of this Court which have applied apportionment principles have uniformly upheld the inclusion in the apportionable tax base of all the properties, values or income attributable to the unitary business carried on in part in the taxing state and (2) that they have uniformly placed the burden on the taxpayer to show that any apportionment formula reaches values, properties or income not reasonably attributable to the taxing state. This is nothing more nor less than applying the "business situs" rule in the "unitary rule" context.

While Mobil here presumes to present a new and novel question to this Court, it ignores a path that this Court has been down innumerable times in deciding utility property tax cases, net worth franchise cases and corporate income tax cases by application of unitary principles.

examination of facts to show that such intangibles were integrated with Wheeling Steel's business at its commercial domicile in West Virginia.

In response to the argument that the intangibles in question ought to be attributable in part to Ohio where the manufacturing operations attributable to the creation of the intangibles were carried on, this Court was careful in *Wheeling* to distinguish the property tax there involved from a net income tax. It there stated:

> "In the face of these facts, it cannot properly be said that the credits arise either where the goods are manufactured or at the sales offices where the orders are taken. The tax is not on the manufacturing or on the privilege of maintaining sales offices. *The tax is not on the net profits of a unitary enterprise demanding a method, not intrinsically arbitrary, of making an apportionment among different jurisdictions with respect to the processes by which the profits are earned. Underwood Typewriter Co. v. Chamberlain,* 254 U.S. 113, 120, 121; *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n,* 266 U.S. 271, 282, 283; *Hans Rees' Sons v. North Carolina, supra.* Such a tax on net gains is distinct from an *ad valorem* property tax on the various items of property owned by the Corporation and laid according to the location of the property within the respective tax jurisdictions. Here, the tax is a property tax on the accounts receivable, as separate items of property, and these are not to be regarded as parts of the manufacturing plants where the goods sold are produced. (Emphasis added; 298 U.S. at 212)

The inference to be drawn from the above-quoted statement of this Court in *Wheeling Steel* is that if *Wheeling* had involved an income tax and thus what was taxed was the profits of the business activities giving rise to the accounts receivable and bank deposits, a rule of apportionment would have been proper.

Again, within a property tax context, this Court in *First Bank Stock Corp. v. Minnesota,* 301 U.S. 234 (1936) applied the business situs rule to shares of corporate stock:

"* * * which, because of the *use in a business* of the owner, may be treated as localized, for purposes of taxation *at the place of the business* * * *" (Emphasis added; 301 U.S. 238)

This Court there aptly stated:

"The rule that property is subject to taxation at its situs, within the territorial jurisdiction of the taxing state, readily understood and applied with respect to tangibles, is in itself meaningless when applied to intangibles which, since they are without physical characteristics, can have no location in space. See *Wheeling Steel Corp. v. Fox, supra,* 209. The resort to a fiction by the attribution of a tax situs to an intangible is only a means of symbolizing, without fully revealing, those considerations which are persuasive grounds for deciding that a particular place is appropriate for the imposition of the tax." (301 U.S. 240-241)

Thus, if this Court should conclude, as urged by Mobil and its amicus, that foreign commerce dictates this Court to make a choice between including the dividends in question and other intangibles from so-called foreign sources in apportionable income versus their taxation solely at the "commercial domicile," policy considerations, under the facts and circumstances of this case, are clearly defined. The question is whether or not the legal fiction of "commercial domicile" should control or whether the unitary concept embodied in all the apportionment decisions of this Court and various state courts should control taxation of income from intangibles.

The underlying basic considerations involved in a determination of where the income from dividends from subsidiary and affiliated corporations of large complex multinational corporations such as Mobil and the members of C.O.S.T. should be attributed for state income tax purposes is considered in "Taxation of Income from Intangibles of Multistate-Multinational Corporations," 29 Vand. L. Rev. 401 (1976). In there discussing the attribution of dividend income to the commercial domicile of the payee corporation, it is stated:

* * * * *

"In considering the assignment of income on the basis of commercial domicile, four important factors should be considered. First, for a state constitutionally to tax 'intangible' income, case law indicates that the intangible property must have benefited from or been protected by the laws of the 'commercial domicile.' This requires a tie-in of activities at the commercial domicile with the intangible investments. If no activity is carried on at the commercial domicile in regard to the intangible investments and if these investments are not related to the commercial domicile activities of the corporation, there would appear to be no constitutional justification for taxation of the intangibles or income from them by the commercial domiciliary state. Secondly, the facts that support taxation at the commercial domicile by reference to the utilization of the intangibles in the overall business of the payee corporation (unitary concept) also support taxation of the intangibles or income derived from them by the 'business situs' states. Thirdly, to assign passive intangible investments to the state where minimal activities concerning the investments take place would be unrealistic. In the case of investments of a parent corporation in controlled affiliated corporations, it is more logical to assign the income on the basis of the location of the parent corporation's activities associated with the business operations of the affiliated corporations. Fourthly, if no one state can legitimately claim a right to tax intangible income to the exclusion of other states, apportionment of intangibles and income from intangibles on the basis of the overall activities of the payee corporation, if not constitutionally required, is the only fair and equitable way of assigning intangible income. This supports full accountability without duplicate taxation, and lends substance to the benefit and protection doctrine by assignment of income to those states that confer benefits and protection to the corporate taxpayers.

* * * * *

"More importantly, since the commercial domicile activities are closely associated with a unitary corporation's business activities everywhere, facts that support taxation of income from passive

investments in intangibles at the commercial domicile also support taxation on an apportionment basis by the states in which the corporation carries on its business activities. It is incongruous to assign income solely to the commercial domicile predicated on the assumption that the corporation's activities in the commercial domicile further the overall corporate business wherever it is conducted and thus, to disregard the claims of the other states where the corporation carries on its business." (29 Vand. L. Rev., pp. 413-414; footnotes omitted)

In discussing the question of whether income from intangibles should be attributed to the states in which the payee corporation carries on its business activities, this article further reads:

"When a corporation acquires, manages, and disposes of intangible property to produce income in the regular course of the corporation's trade or business, that income should be attributable among all the states in which that trade or business is conducted. In substance, this assigns intangible income to the 'business situs' on the basis of benefits and protection afforded as a result of the activities of the corporation. Business situs concepts also form the basis of assigning intangible income to the commercial domicile of a corporation. Certainly this business situs concept offers an alternative that is preferable to the assignment of intangible income on the basis of the legal fictions of commercial or legal domicile or on the basis of the activities of the payor corporation.

"The more difficult question involves the assignment of income from intangible property that represents passive investments of the corporation. If these passive investments have been made possible by the business activities of the corporation in the states in which those business activities have been conducted, and if the income from these passive investments is used generally by the corporation in carrying on its trade or business, should not income from these investments be attributable to the states in which the corporation carries on its business activities?

* * * * *

"Whether the corporate activity test is best depends upon the reason for resorting to an apportionment method of assigning income in the first instance. Income of multistate and multinational businesses is apportioned because it is not possible to allocate the income accurately to the sources or to the activities that these businesses carry on in each taxing jurisdiction. The purpose of apportionment is to divide the entire income tax base of a corporation among those states that have an otherwise indeterminate but legitimate claim to a portion of that tax base.

* * * * *

"* * * the underlying jurisdictional basis for taxation at the commercial domicile, apart from arbitrary property situs concepts, is the notion that the intangibles are business assets, and income from intangibles is income attributable to the business.

* * * * *

"When more than one state taxing jurisdiction has a legitimate claim to the right to tax income from passive investments in intangibles based on the activities of the payee corporation, the assignments of such income by an apportionment formula produces the most equitable result. Indeed, it may be constitutionally required unless the intangible investments are not integrally related to the corporation's business activities. Even if the intangibles are not utilized by a corporation in the conduct of its business, assignment of the income to the 'commercial domicile' is constitutionally suspect. Even when investments in intangibles require corporate activity, the most reasonable rule is to assign the resulting income to the states in which the overall corporate activity is conducted. Otherwise, the income would be assigned on the basis of a meaningless fiction, with the result that large segments of corporate income would be totally exempt, 'nowhere income.'" (29 Vand. L. Rev., pp. 414-419; footnotes omitted)

Assuming arguendo that the legal fiction of "commercial domicile" is superior to the unitary apportionment method for the division of income from passive "investments" in intangible properties, the question here is

whether the choice of methods should be a function of this Court. In regard thereto, Jerome R. Hellerstein in "State Taxation Under the Commerce Clause: An Historical Prospective," 29 Vand. L. Rev. 335 at 347-348 stated:

> "Conflicting methods of division of income or other tax bases that result in taxation of more than one hundred percent of the base are inequitable and oppressive to multistate taxpayers. Diversity in state or local tax apportionment, which often results in overall undertaxation of an enterprise, is likewise unfair to the governments and oppressive to competitive intrastate businesses. Nevertheless, the Supreme Court consistently had taken the position, long before 1959, that it is beyond its constitutional province to prescribe methods of dividing income or other tax bases for the states, and that diverse and conflicting methods of apportionment, mischievous though they be, do not violate the commerce clause or the due process clause, so long as each state's method, considered on its own merits, is not repugnant to the Constitution. In my judgment, the Court is on solid constitutional ground and is eminently wise in holding to this position. Unless adequate collaborative action is taken by the states—perhaps along the lines of the Multistate Tax Compact—to achieve substantial uniformity in the division of the net income and other measures, this is an area that calls for congressional regulation. The courts cannot do the job; only the states and Congress are equipped to develop and administer workable policies."

We thus respectfully disagree with the position of Mobil and its amicus in this case that fiscal policy considerations support their claimed tax immunity based on the application of the legal fiction of commercial domicile. We believe that Mobil's income from its intangible properties derived from and utilized in its integrated unitary business should be distributed "wherever * * * its work is done" (*Adams Express Co. v. Ohio State Auditor, supra* at 166 U.S. 223).

3. The History and the Judicial Decisions do not Support Taxation of Dividends Only by the State of Commercial Domicile, But Rather, Support the Inclusion of Dividends in Apportionable Income for State Income Attribution Purposes if the Stocks and the Income Derived Therefrom are Acquired and Managed as an Integral Part of the Taxpayer's Unitary Business which it Conducted in Part in the Taxing State.

As heretofore indicated on pages 45-47 of this brief, this court has traditionally upheld the inclusion of the entire net income of a multistate/multinational corporation in apportionable net income so long as the taxpayer has not established, by clear and cogent evidence (1) that the apportionment result taxes income not reasonably related to instate activities or sources; or (2) that the income included in apportionable income is unrelated to or disassociated from the business carried on in part in the taxing state.

Nevertheless, on pages 29-30 of its brief, Mobil asserts that history and judicial decisions support the "taxation of dividends" *only* by the state of commercial domicile.

In regard to Mobil's "history" aspect of this argument, we fail to see its relevancy if there otherwise existed any such "history." While Mobil cited Volume 1 of the "Willis Report" (Ibid., footnote 34) at page 204 et seq. in support of its history argument, an examination of the analysis contained therein reveals no such history. As to those states which employ "specific allocation" of dividends and other forms of intangible property, the Willis Report concluded:

> "Because of the difference in the types of income subject to allocation and the variety in attribution rules, the treatment given to a particular item may vary substantially. With regard to such income as interest, dividends, rents and royalties, and capital gains there are no rules of universal applicability. Instead, so diverse is the treatment that the diversity

itself lends support to the conclusion that it is futile to search even in theory for the single true source of any particular item of income earned by a multistate taxpayer.

Specific allocation creates more than mere theoretical problems. Since taxpayers are required to calculate their liabilities in exact dollar amounts, rules for allocating particular types of receipts can create complex compliance problems." (Willis Report, *Ibid.*, footnote 34 pp 216-217)

Based on these considerations, the Willis Report recommended apportionment of all income, without the use of either "separate accounting" or specific allocation.[39]

Furthermore, to the extent that "history" is relevant, we believe current "history" is more significant. Mobil admits and Appendix F of its brief (pages 37a-39a) indicates that the vast majority of the states now apportion taxable dividend income.[40]

Twenty-nine states apply the unitary concept in accordance with UDITPA standards.[41]

Thus, to the extent that dividends constitute "business income" (which is presumptively the nature of Mobil's dividends in question since there is no showing that its stocks in question and the income derived

[39]Report of the special Subcommittee on State Taxations of Interstate Commerce of the Committee on the Judiciary House of Representatives, Volume 4, Part VI—Recommendations (H. Report No. 952, 89th Cong. 1st Sess., September 2, 1965) pages 1135 and 1144.

[40]As indicated *supra* at pages 72-75, there is apparently no state that would tax dividends based solely on the legal fiction of "commercial domicile" under the facts and circumstances of this case. The states generally apply the unitary concept to determine what constitutes apportionable income.

[41]UDITPA apportions dividends and all other income to the extent that constitute business income in accordance with the definition of business income contained in Section 1(a) of UDITPA which reads:

"Business income" means income arising from transaction and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

therefrom, were not acquired and used by Mobil in its integrated business operations subject to apportionment in part in Vermont), "history" refutes, rather than supports, the historical argument of Mobil.

In regard to judicial precedent, the case relied upon by Mobil in footnotes 16 and 17 of its brief (pages 29-30) do not support its argument.

These cases do not support the proposition that dividends are taxable by any state for income tax purposes by mechanical application of the legal fiction "commercial domicile." In fact, judicial precedent establishes the apportionment of dividends if the stocks and dividends constitute a part of the unitary business carried on in the state. This is simply a modern application of the "business situs" rule which in turn is the substance of the "commercial domicile" rule.

The cases have universally held that the income of a unitary business which is connected with business activities carried on in part within a taxing state may be subject to formulary apportionment even though derived from intangible properties. In *International Harvester v. Department of Taxation*, 322 U.S. 435 (1944), and *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940), this Court upheld the apportionment of income from dividends against the payor corporation based on its instate activities. In *Montgomery Ward & Co. v. Commissioner of Taxation*, 276 Minn. 479, 151 N.W.2d 294 (1967), and *Great Lakes Pipeline Co. v. Commissioner of Taxation*, 272 Minn. 403, 138 N.W.2d 612 (1965), app. dism'd 384 U.S. 718 (1966), the Court held that interest income was business income subject to apportionment.

In *F. W. Woolworth Co. v. Director of Division of Taxation*, 45 N.J. 466, 213 A.2d 1 (1965); *Gulf Oil Corp. v. Morrison*, 120 Vt. 324, 141 A.2d 671 (1958); and *F. W. Woolworth Co. v. Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972), the Courts held that dividend income was subject to apportionment either as business income or as a part of the unitary income of the payee corporation. In

Sperry & Hutchinson Co. v. Department of Revenue, 270 Or. 329, 527 P.2d 729 (1974), the Court held that interest income used in the trade or business of the taxpayer was subject to apportionment under UDITPA. As indicated in *Appeal of W. J. Voit Rubber Co., May, 1947 C.C.H. Cal. Tax Rep. para. 202-435*, and cases cited therein, the California Board of Equalization has always held that income from a unitary business, whether from intangible properties or otherwise, is subject to formulary apportionment. In *In Re Goodyear Tire & Rubber Co. Corporate Income Tax 1966, 1967, 1968*, 133 Vt. 132, 335 A.2d 310 (1975), the Court upheld the apportionment of dividend income.[42]

The income apportionment decisions of this court have likewise sustained the apportionment of the entire income of a unitary trade or business. None has ever upheld a hybrid combination of "separate accounting" and apportionment of unitary income—the method Mobil and its amicus curiae here urge should constitute the due process and commerce clause constitutional standard.

4. Decisions of this Court Do Not Support Exclusion of So-Called "Foreign Source" Dividends from Apportionable Income for Income Attribution Purposes.

Mobil's argument that decisions of this Court support its exclusive "commercial domicile" jurisdictional argument (App. Br., pp. 34-36) is refuted by all of the unitary apportionment decisions of this Court from *Adams Express, supra*, through *Moorman, supra*.

[42]See the cases discussed at pages 40-47, *supra*, and the following: *Maxwell v. Kent-Coffey Mfg. Co., supra*, 204 N.C. 355, 168 S.E. 379 (1933), aff'd 291 U.S. 642 (1934); *Cleveland Cliffs Iron Co. v. Corp. & Sec. Com.*, 351 Mich. 652, 88 N.W.2d 564 (1968); *ASARCO v. Montana Dept. of Revenue*, 567 P.2d 901 (Mont. 1977); *Champion International Corp. v. Bureau of Revenue*, 88 N.M. 411, 54 P.2d 1300 (1975); *Qualls v. Montgomery Ward*, Sup. Ct. of Ark., dec'd July 2, 1979; *Albany International Corp. v. Halperin*, 388 A.2d 902 (Me. 1978); *Johns-Manville Products Corp. v. Comr. of Rev. Admin.*, 115 N.H. 428, 343 A.2d 221 (1975).

Mr. Justice Rutledge's concurring and dissenting opinion in the sales and use tax cases of *McLeod v. Dilworth Co., supra; General Trading Co. v. State Tax Commission, supra;* and *International Harvester Co. v. Evatt, supra*, at 322 U.S. 349 (considered *supra* at page 61 in connection with Mobil's "risk" argument) is totally irrelevant. There is a vast difference between income tax attribution rules as applied to the unitary income of a multinational business and sales or use tax attribution rules applied to interstate sales transactions. This is demonstrated by the specific facts of *Moorman*. If Mobil's sales and use tax jurisdiction analogy is controlling, this Court could have disposed of *Moorman* by simply holding that Iowa had exclusive jurisdiction to tax the entire net income of any interstate sales with Iowa destinations, even though some income therefrom was shown to be specifically attributable to out-state activities and sources. This it did not do.

G. The Inclusion of "Federal Taxable Income" In Apportionable Income for Vermont Income Tax Purposes Does Not Conflict with Any Federal Policy in Regulating Foreign Commerce Because it Does Not Constitute the Regulation of or Taxation of Foreign Commerce and Because There Otherwise Exists No Federal Policy with Which it is in Conflict.

On pages 38-48 of its brief, Mobil argues that the Vermont tax should be invalidated by this Court "on the ground that it conflicts with established federal policy in regulating foreign commerce." (App. Br., p. 38) Mobil assumes that the income taxed by Vermont is from "that foreign commerce conducted by United States based enterprises." (App. Br., p. 39)

Mobil and its amicus, in arguing this proposition, fail to address their argument to the initial question of how the inclusion of dividends of a domestic United States Corporation, in apportionable income, constitutes either a

regulation of foreign commerce or a tax on foreign commerce under the Constitution. Vermont is not imposing any tax on either "foreign commerce" or any income which Mobil derives from "foreign commerce." To the extent that Mobil engages in any foreign commerce, the Vermont apportionment formula attributes this alliquot part of Mobil's income to foreign commerce.

Assuming arguendo that Vermont's inclusion of dividend income in apportionable income could be construed to constitute taxation of income from foreign commerce, still Mobil has established no basis for its conclusion that this is unconstitutional inference, in any manner, with foreign commerce or international relations of the federal government. Vermont is not including in its income tax base any income which is not included in federal taxable income and in fact taxed by the United States.

It is immaterial that the Internal Revenue Code, solely for United States income tax purposes, allows a partial tax credit for foreign taxes on certain dividend income under different jurisdictional and complex income tax attribution rules solely for federal income tax purposes. This is particularly true (1) when such credits do not eliminate any effective taxation by the United States of the dividend income of domestic United States corporations; and (2) when there is no showing here how these credits apply to Mobil's dividends in question. While partial double taxation of dividend income is eliminated at the federal level under the Internal Revenue Code by the partial tax credit device, at the state level it is assured by the application of apportionment rules.

Nor does the special dividend deduction provided for in the I.R.C., Sec. 243 support Mobil's argument. It pertains only to *double taxation by the United States of the dividends of domestic corporations at the corporate level irrespective of "source."* This deduction has nothing to do with the issue of double taxation of foreign source dividend income. Vermont allows this deduction automat-

ically by including only "federal taxable income" in apportionable income. Also, Vermont has not subject to taxation any of the profits of Mobil's subsidiary and affiliated corporations. Thus, any analogy to § 243 is misplaced.

Neither does the network of treaties between the United States and foreign countries have anything to do with the question at issue. These treaties are entered into by the United States to protect their own citizens, residents and domestic corporations from inappropriate or discriminatory taxation *by other nations.* They do not restrict how the United States chooses to tax its own citizens, residents or domestic corporations. Any such United States tax policy can be fully implemented without any treaty. It is solely a matter of concern of the states and the Congress. To the extent these treaties have anything to do with state taxation, they expressly so provide.

The fallacy of the foreign policy argument of Mobil and its amicus is demonstrated by the conclusions of the Willis Committee that a state income tax base should conform to international tax policy of the United States, and that it does conform to this policy if a state income tax base includes only federal taxable income. As stated in the recommendations of the Willis Committee:

> "* * * if a corporation is considered to have income from sources outside the United States and that income is taxable by the United States, such income could be included in a state's tax base prior to apportionment and the state would not be required to include property or payroll located outside the United States in its apportionment formula. *These rules would apply to corporations incorporated in the United States and are designed to make available for apportionment among the states all of the tax base available to the United States.*" (Emphasis added, Report of the Special Subcommittee on State Taxation of Interstate Commerce, H.R. No. 952 89th Congs., 1965, Vol 4, p. 1155)

Neither do the cases of *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940) or *Japan Line, supra,* support the

"foreign policy" argument of Mobil and its amicus. The *McGoldrick* case involved the application of a specific tax immunity policy incorporated in a specific federal statute.

The *Japan Line* decision was based on a very definite federal statutory and regulatory pattern as well as a clearly defined international tax policy among the nations of the world which were designed to exempt instrumentalities of international commerce from any property taxation except by the domicillary nation.

In the instant case there is absolutely no federal or international policy which in any way supports the argument that dividend income of domestic United States payee corporations, irrespective of the country of incorporation or location of the business activities of the payor corporation, shoud be taxed only by the state of the "commercial domicile."

CONCLUSION

Mobil and its amicus ask this Court to invalidate Vermont's corporate income tax statute, as applied to Mobil, under the facts and circumstances of this case. In so doing, they advance various abstract and hypothetical arguments, which on close analysis, are devoid of any constitutional significance. Their due process argument is frivolous since it is based on the twin invalid assumptions (1) that Vermont has imposed a tax on its dividend income which it derives from activities without Vermont; and (2) that income from out-of-state activities cannot be included in apportionable net income. These assumptions ignore the nature of a net income tax and the significance of reasonable apportionment rules.

Their commerce clause argument, in addition, is based on the assumption that reasonable apportionment rules are invalid if they expose any item of income included in apportionable income to a speculative risk of multiple taxation. They further assume that this Court's function under the commerce clause is to mandate uniform national rules to avoid any such speculative risk

as pertains to what they label as "foreign source income." In support of this argument, they rely on *Japan Line* and purport to distinguish *Moorman* and other apportionment decisions of this Court. Since *Japan Line* is clearly distinguishable and *Moorman* and other unitary apportionment decisions of this Court are directly in point, the "foreign commerce" argument of Mobil and its amicus likewise lacks any merit.

It is therefore respectfully submitted that this Court should affirm the Vermont Supreme Court decision and find that the Vermont apportionment formula, as applied to Mobil's federal taxable income, is valid in every respect inasmuch as Mobil has not established that Vermont has taxed any net income of Mobil not reasonably related to its Vermont business for the years in question.

DATED this 14th day of August, 1979.

Respectfully submitted,

WILLIAM D. DEXTER
General Counsel
Multistate Tax Commission

Supreme Court, U. S.
FILED
AUG 20 1979
MICHAEL RODAK, JR., CLERK

No. 78-1201

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

MOBIL OIL CORPORATION,
Appellant,

vs.

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

On Appeal From the Supreme Court of Vermont

BRIEF OF THE STATES OF ILLINOIS, CONNECTICUT, MASSACHUSETTS, AND NEW HAMPSHIRE AS AMICI CURIAE

WILLIAM J. SCOTT,
Attorney General of Illinois
160 North LaSalle Street,
Suite 900
Chicago, Illinois 60601

CARL R. AJELLO
Attorney General of Connecticut
92 Farmington Avenue
Hartford, Connecticut 06115

FRANCIS X. BELLOTTI
Attorney General of Massachusetts
2000 McCormick Building
Ashburton Place
Boston, Massachusetts 02108

THOMAS D. RATH
Attorney General of New Hampshire
State House Annex
Concord, New Hampshire 03301

FRED H. MONTGOMERY,

JOHN D. WHITENACK,
Special Assistants Attorney General

LLOYD B. FOSTER,
Litigation Counsel
Illinois Department of Revenue
160 N. LaSalle Street,
Suite 600
Chicago, Illinois 60601

Of Counsel

Printed by the Authority of the State of Illinois—8-79-115

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of Amici Curiae	1
Argument	
Reliance upon federal taxable income in the apportionment of income for state tax purposes does not violate either the Due Process Clause or the Commerce Clause	3
Introduction	3
A. Due Process Clause considerations	5
B. Commerce Clause considerations	10
C. Fairly apportioned state taxation cannot be circumvented by business transactions abroad	12
Conclusion	16

TABLE OF AUTHORITIES

Cases: **Page**

Adams Express Co. v. *Ohio*, 165 U.S. 194, (1896) rehearing 166 U.S. 194 (1897) 8
Albany International Corp. v. *Halperin*, ____ Me. ____, 388 A.2d 902 (1978) 12
Appeal of Texaco, Inc., California State Board of Equalization, CCH—Cal. Tax Rptr., par. 205-822 (January 8, 1978) 8
ASARCO, Inc. (formerly The American Smelting and Refining Co.) v. *Idaho State Tax Comm.*, ____ P.2d ____ (decided March 12, 1979), motion to dismiss pending, U.S. Docket (No. 78-1839) 12
Bass, Ratcliff and Gretton, Ltd. v. *State Tax Commissioner*, 266 U.S. 271 (1924) 6, 8, 9
Butler Bros. v. *McColgan*, 315 U.S. 501 (1942) 6, 8, 9
Chestnut Securities Co. v. *Oklahoma Tax Commission*, 125 F.2d 571 (10th Cir., 1942), cert. denied, 316 U.S. 668 (1942) 10
Department of Revenue v. *Association of Washington Stevedoring Companies*, ____ U.S. ____, 98 S.Ct. 1388, 1401 (1978) 14
Ford Motor Co. v. *Beauchamp*, 308 U.S. 331 (1939) 8
Japan Line, Ltd., et al. v. *County of Los Angeles, et al.*, No. 77-1378, ____ U.S. ____, 99 S.Ct. 1813 (decided April 30, 1979) 14, 15
John Deere Plow Co. of Moline v. *Franchise Tax Board*, 238 P.2d 569, appeal dismissed, 343 U.S. 939 (1951) 6
Johns-Manville Products Corp. v. *Comm. of Rev. Adm.*, 115 N.H. 428 (1975), appeal dismissed, 423 U.S. 1069 (1976) 11
Montana Dept. of Rev. v. *American Smelting and Refining Co.*, 567 P.2d 901 (Mont. 1977), appeal dismissed, 434 U.S. 1042 (1978) 12
Moorman Manufacturing v. *Bair*, 437 U.S. 267, 98 S.Ct. 2,340 (1978) 3, 4, 5, 6, 7
Northwestern States Portland Cement Co. v. *Minnesota*, 358 U.S. 450 (1959) 7
Pacific Telephone and Telegraph Co. v. *Franchise Tax Board*, 102 Cal. Rptr. 782, 498 P.2d 1030 (1972) 10
Qualls v. *Montgomery Ward & Co.*, No. 78-35 ____ Ark. ____ (decided July 2, 1979) 11
Southern Pacific Company v. *McColgan*, 68 Cal. App. 2d 48, 156 P.2d 81 (1945) 10
Underwood Typewriter Co. v. *Chamberlain*, 254 U.S. 113 (1920) 6

Page

United Gas Corporation v. *Fontenot*, 241 La. 488, 129 So. 2d 748 (1961) 10
W. R. Grace & Co. v. *Comm. of Rev.*, ____ Mass. ____ (decided June __, 1979) 11

Constitution:

Commerce Clause, Article I, § 8, cl. 3 ..... 3, 5, 6, 9, 10
Due Process Clause, Amendment XIV, § 1 ..... 3, 5, 6, 7, 11

Statutes:

Internal Revenue Code, 26 U.S.C.
§ 1, *et. seq.* 3, 14
Illinois Revised Statutes, ch. 120
§ 203(b)(2) 3
§ 203(d)(1) 3
§ 303 4
§ 1501(a)(1), 304 ..... 3, 4
§ 304(e) 4
§ 1501(a)(1) 4
Connecticut General Statutes, Ch. 208
§ 12-213 3
§ 12-218(3) 3
§ 12-218 4
§ 12-221(a) 4
Maine Revised Statutes, Title 36
§ 5102(8) 3
§ 5210, 5211 3
§ 5210(a) 4
§ 5211(17) 4
Massachusetts General Laws, Ch. 63
§ 30 3
§ 38 ..... 3, 4
§ 42 4
New Hampshire Revised Statutes
Ch. 77-A:1 (III and IV) 3
Ch. 77-A:3 3
Ch. 77-A:3 (III) 4
New York Tax Law
§ 210(b) 10
Vermont Statutes Annotated, Title 32
§ 5833(b) 8, 16

Other Authorities:

29 Vanderbilt Law Review 401, 404 (March, 1976) 12
United States Senate, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, testimony of William B. Tavoulareas on 1/21/76 8
Securities and Exchange Commission, 10-K report filed by Mobil Oil Corp. for the year ending 12/31/73 at p. 32. 8
42 Journal of Taxation, State and Local Taxation, p. 106, Feb., 1975 14

No. 78-1201

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

MOBIL OIL CORPORATION,

Appellant,

vs.

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

On Appeal From the Supreme Court of Vermont

BRIEF OF THE STATES OF ILLINOIS, CONNECTICUT, MASSACHUSETTS AND NEW HAMPSHIRE AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

Federal taxable income is the starting point for determining State income taxes in most States, including Illinois, Vermont, Connecticut, Massachusetts and New Hampshire. The concepts of fair apportionment and relief from tax inequities are also essential parts of your *Amici'* income tax provisions.

The appellant seeks to avoid Vermont's attempt to tax certain income solely because it is "foreign" income. If the appellant is successful, the consequences will be severe. Established constitutional principles regarding State taxation on an apportioned basis will be nullified. All components of income, particularly interest, capital gains, royalties, rents, dividends, and consultant fees, will be affected. This will have a marked impact on State revenues, and it will undermine the degree of fairness and uniformity the States have achieved in their taxation of residents and corporations.

This brief is submitted on behalf of the States of Connecticut, Illinois, Massachusetts, and New Hampshire. It is filed pursuant to Rule 42(4) of the Rules of this Court, and the consent of the parties is not required.

RELIANCE UPON FEDERAL TAXABLE INCOME IN THE APPORTIONMENT OF INCOME FOR STATE TAX PURPOSES DOES NOT VIOLATE EITHER THE DUE PROCESS CLAUSE OR THE COMMERCE CLAUSE.

INTRODUCTION

The *Amici,* like Vermont, rely upon federal taxable income, as defined in the Internal Revenue Code, 26 U.S.C. 1, et seq., as the starting point in their determination of the tax base of corporate taxpayers.[1] Conn. Gen. Stat. Ch. 208 § 12-213; Ill. Rev. Stat. ch. 120, § 203(d)(1); Me. Rev. Stat. Title 36 § 5102(8); Mass. Gen. Laws Ch. 63, § 30; N.H. Rev. Stat. 77-A:1(III and IV).

If a corporation conducts business activities both within and without a state, only a portion of its income is taxed by the State. In order to determine the portion of income which it may fairly subject to tax, each State applies an apportionment formula. Conn. Gen. Stat. Ch. 208, § 12-218(3); Ill. Rev. Stat. ch. 120, § 304; Me. Rev. Stat. Title 36 § 5210, 5211; Mass. Gen. Laws Ch. 63, § 38, N.H. Rev. Stat. Ch. 77-A:3.

The fact that these apportionment formulas may differ among the States does not violate either the Due Process Clause or the Commerce Clause. *Moorman Manufacturing* v. *Bair,* 437 U.S. 267, 98 S.Ct. 2340 (1978). Each apportionment formula consists of two basic parts—the apportionment factor

---

[1] Each of the states which impose a direct tax on income excludes income which under the laws of the United States is exempt from taxation by the States. Principally this includes interest income on U.S. Government obligations. Some States provide for additional modifications such as the addition of municipal interest and the subtraction of State tax refunds. See Illinois Revised Statutes, ch. 120, § 203(b)(2).)

and the tax base.[2] The validity of Vermont's apportionment factor is not contested by appellant. Some States, like Vermont, include all taxable income in their tax base. 32 V.S.A. § 5811(18); N.H. Rev. Stat. 77-A:1 (III and IV). Other States have specific rules of allocation. Conn. Gen. Stat. Ch. 208, § 12-218; Ill. Rev. Stat. Ch. 120, § 303; Mass. Gen. Laws Ch. 63, § 38. Some States distinguish between business income and nonbusiness income, including only the former in their tax base.[3] Ill. Rev. Stat. ch. 120, § 303, 304, 1501(a)(1); Me. Rev. Stat. Title 36, § 5210(a).

Each State statute, like Vermont's, contains a relief provision whereby, if the apportionment formula does not apportion income in a manner which fairly represents the extent of its business activities within the state, the corporation may petition for such modifications as are necessary to achieve an equitable allocation and apportionment of income. Conn. Gen. Stat. Ch. 208, § 12-221(a); Ill. Rev. Stat. ch. 120, § 304(e); Me. Rev. Stat. Title 36, § 5211(17); Mass. Gen. Laws. Ch. 63, § 42; N.H. Rev. Stat. 77-A:3, III.

Appellant argues that only its commercial domicile may tax the dividends it receives from corporations which operate in foreign countries. *Amici* are concerned that many corporations with significant tax liability can and will assert this same proposition. *Amici* are also concerned that all income from

[2] The discussion in *Moorman* of the interrelation between Iowa's single apportionment factor and "other division of income problems", 437 U.S. at ____, 98 S.Ct. at 2347 is a recognition that the tax base is an integral factor in the apportionment formula.

[3] Illinois and Maine have adopted the Uniform Division of Income for Tax Purposes Act (UDIPTA) definition of business income. 'Business income' means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from the acquisition, management or disposition of tangible and intangible property when such acquisition, management or disposition constitute integral or necessary parts of the taxpayer's trade or business operations.

intangibles (such as interest, rents, royalties, license fees and capital gains) will be affected by ressurection of a commercial domicile theory of taxation. In addition, all income from domestic and foreign operations, production, services and sales will be affected by adoption of a geographical source theory of taxation. Also at stake is the preservation of the element of fairness inherent in a system of State taxation which relies upon federal taxable income, apportions income among the states, and provides relief upon a sufficient presentation of facts.

Mobil did not present any facts to prove that the management and control of the assets which yielded the dividends occurred in its commercial domicile. It simply stated that these activities took place outside of Vermont. (Appendix, p. 83) Implicit in the question of whether a non-domiciliary State may apportion "foreign" income are these two considerations: Can a non-domiciliary State apportion "foreign" income when the underlying assets are managed and controlled in *another* non-domiciliary State?; Can a non-domiciliary State apportion "domestic" income when the underlying assets are managed and controlled in the domiciliary State? *Amici* respectfully submit that this Court has already held that similiar "division of income" questions are political in character and deserving of action by Congress:

> It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decision. *Moorman, supra,* 98 S.Ct. at 2348.

A.

Due Process Clause Considerations

With respect to the Due Process Clause, Mobil argues essentially that Vermont cannot apportion foreign dividend income because it does not have a "definite link" or "minimum

connection" with the ownership, management and control of Mobil's stocks and the dividends they produced, and it does not have a "nexus" with the payor corporations who operated almost entirely outside of the United States. (Appellant's Br. p. 9) The argument is based on Mobil's statement submitted at the hearing, but it is not supported by any legal authority. (Appellant's Brief, p. 9-13.) It simply states that the Due Process Clause requires an inquiry into the geographical location of the management of investments and the operations of payor corporations.

Appellant ignores the two restrictions placed on a State's power to tax income generated by interstate business activity which were expressly set forth in *Moorman, supra.* It does not argue that there is no minimal connection between its business activities and Vermont. Nor does it argue that there is no rational relationship between the income apportioned by Vermont and the values connected with Vermont. Instead, it attempts to avoid the effect of *Moorman, supra,* by asserting that the Due Process Clause places a third restriction on the State's taxation of income—that a state must have "jurisdiction" over each component of income included in its tax base. This proposition is also without legal authority, except for the two inheritance tax cases, the two use tax cases, and the two Commerce Clause cases cited in note 6 of Appellant's Brief at p. 12, none of which are apposite to an apportioned income tax case.

To place a jurisdictional requirement over each and every type of income would render the two due process restrictions in *Moorman* meaningless. A "jurisdictional" requirement in addition to a "nexus" requirement would also directly contradict the established line of cases in which an apportioned income tax withstood scrutiny under a due process inquiry. See *Underwood Typewriter Co.* v. *Chamberlain,* 254 U.S. 113 (1920); *Bass, Ratcliff and Gretton, Ltd.* v. *State Tax Commissioner,* 266 U.S. 271 (1924); *Butler Bros.* v. *McColgan,* 315 U.S. 501 (1942); *John Deere Plow Co. of Moline* v. *Franchise Tax Board,* 238 P.

2d 569, appeal dismissed, 343 U.S. 939 (1951) and *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959). The Due Process Clause requires a nexus between a State and the business activities of the taxpayer. It does not require a nexus between a State and each particular type of activity in which the taxpayer is engaged. ". . . (A)ppellant's claim that the Constitution invalidates an apportionment formula whenever it may result in taxation of some income that did not have its source in the taxing state is incorrect." *Moorman,* ____ U.S. at ____, 98 S.Ct. at 2344.

Curiously enough, appellant argues that "The activities, personnel and property of Mobil in Vermont, in which only the marketing of petroleum and related products was conducted, have nothing to do with Mobil's holding of stock in foreign subsidiaries or affiliates or its foreign investments, or the dividend income they produce." (Appellant's Brief p. 10.) This is precisely the factual predicate which, if established by clear and cogent evidence, would entitle Mobil to exclude its dividend income from Vermont's tax base.[4] Mobil did not attempt to prove this. Instead, it artfully phrased its proposed stipulation so as to avoid the obvious fact—Mobil's marketing activities in Vermont are related to its foreign investment activities.

Mobil operates a unitary business, and all of the income in issue was earned as a result of its unitary business activities. A review of the Annual Reports indicates that Mobil is engaged in the exploration, production, transportation, refining and marketing of petroleum related products throughout the world. See

---

[4] Of course Mobil would also have to exclude the expenses incurred in earning these dividends, and it would have to omit the property, payroll and sales figures attributable to its "holding company" from the denominators of the apportionment factors. Assuming, *arguendo,* that dividends should be excluded from taxable income, the method of separate accounting used in Mobil's tax returns understates income by the deduction of "holding company" expenses, and by the failure to make the necessary eliminations from the property, payroll and sales denominators.

Exhibits 9, 11 and 13. The President of the company, Mr. William P. Tavoulareas, described the importance of the interdependence of Mobil, its subsidiaries and affiliates in testimony before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, on January 21, 1976. The record establishes that approximately 87% of the dividends at issue were paid by Mobil Marine Transportation Ltd., Mobil Oil Iraq with Limited Liability, Pegasus Overseas Ltd., and Arabian American Oil Company. Certainly if any of these companies had been engaged in a business unrelated to the production, transport and sale of petroleum products, it would have been in Mobil's interest to establish that fact.[5] [See Vermont's relief provision, 32 V.S.A. § 5833(b).]

An established line of cases concludes that the income of a unitary business is indivisible and that it should be taxed as such. *Adams Express Co.* v. *Ohio*, 165 U.S. 194 (1896), rehearing 166 U.S. 185 (1897); *Bass, Ratcliff and Gretton, Ltd., supra; Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331 (1939); *Butler Bros., supra.*

---

[5] Among other things, an inquiry into the relation between appellant and its investment in subsidiary and affiliated companies would reveal business activities similar to those revealed in *Appeal of Texaco, Inc.*, California State Board of Equalization, January 11, 1978, CCH-Cal.—p. 14, 905-54, para. 205-822. In that case, Texaco purchased a 7% interest in a consortium which acquired the exclusive right to use and manage all oil reserves, producing equipment, refining facilities, pipelines, etc. in Iran. Texaco formed a wholly owned subsidiary, Texaco Iran Ltd., and assigned to it all of its rights under the consortium agreement. The subsidiary had no employees and was, in effect, a "paper corporation". The subsidiary purchased oil from Iran at one-eighth (12½%) of the "posted price" as established by Iran. This oil was immediately sold at the "posted price" to another wholly owned subsidiary of Texaco, Texaco Overseas Petroleum Company (TOPCO). TOPCO resold the oil at the world price which was considerably lower than the "posted price". The net profits of Texaco Iran Ltd. were substantially greater than the losses sustained by TOPCO. Texaco paid the expenses of Texaco Iran Ltd. and, in return, received dividends from the subsidiary. Mobil's 10-K report to the SEC for year ending 12-31-73 at p. 32 indicates that Mobil owned a similar 7% interest in this consortium.

In *Bass, Ratcliff & Gretton, Limited* v. *Tax Commission, supra,* the British taxpayer argued that it: 1) "had no net income upon which it was subject to a federal income tax"; 2) New York was therefore imposing a tax on "a portion of its net income derived from business carried on outside of the United States"; 3) This tax was "a direct burden upon its foreign commerce in violation of the Commerce Clause of the Constitution". (id., 279-280) Despite these contentions, New York's tax on Bass' *world-wide income* (measured by a ratio of New York/World-wide real estate, tangible personal property, bills and accounts and stock ownership) was approved.

In *Butler Brothers, supra,* the taxpayer argued that its sales operations in California could be discontinued without any effect on its high volume buying power. However, Mr. Justice Douglas reasoned that the same argument could be made as to each of its several retail operations. It was the cumulative effect of the entire Butler Brothers' operations which made possible the profitable combination of high volume purchases and high volume sales.

The same principle is true for Mobil Oil Company. Its world-wide operations would not be materially affected if its marketing operations in Vermont were discontinued. Similarly, if every Mobil gas station in Illinois were shut down, its world-wide operations would still be enormous. However, it is the cumulative marketing power generated by its many state operations which make Mobil the petroleum giant it is. It is the unitary nature of its business which not only makes possible, but requires, Mobil's multi-billion dollar investment in domestic and foreign subsidiaries and affiliates. When a unitary business operates within and without a State, that State has the right to levy a reasonably apportioned tax on the unitary business income.

B.

Commerce Clause Considerations

Appellant argues that because of the risk of multiple taxation by the States, its foreign dividend income should only be included in the tax base of its commercial domicile. This argument is without merit.

Mobil does not contend that it experiences multiple taxation in fact. Mobil's commercial domicile does not tax 100% of dividend income; instead it relies upon a unique apportionment formula. N.Y. Tax Law §210(b). The basis of the decision by the court below was that Mobil had failed to establish that the State of commercial domicile had the power to tax 100% of dividends. Mobil does not cite any additional authority to this Court in support of the alleged power of the commercial domicile.[6]

In fact, appellant concedes that the "business situs" of the stock or the legal domicile may be more empowered to tax dividends than the commercial domicile. Appellant's Brief, p. 32, note 17. If stock or other intangibles "become an integral part of a business carried on in a State, they acquire a 'business situs' and may be taxed in that State [citations omitted.]" Appellant's Brief, p. 30, note 17. Of course, this is inconsistent with the legal authority cited above that all of the income generated by a unitary business may be apportioned, but it demonstrates that appellant recognizes the fallibility of its commercial domicile theory of taxation.

Neither the actuality nor the substantial risk of multiple taxation has been established. Even if it had been demonstrated, the domiciliary's law of allocation must yield to the

[6] Appellant continues to rely solely upon *Chestnut Securities Co.* v. *Oklahoma Tax Commission*, 125 F. 2d 571 (10th Cir., 1942), cert. denied, 316 U.S. 668 (1942); *Southern Pacific Company* v. *McColgan*, 68 Cal. App. 2d 48, 156 P. 2d 81 (1945); *United Gas Corporation* v. *Fontenot*, 241 La. 488, 129 So. 2d 748 (1961); and *Pacific Telephone and Telegraph Co.* v. *Franchise Tax Board*, 102 Cal. Reptr. 782, 498 P. 2d 1030 (1972). See note 17, Appellants Brief at p. 30.

nondomiciliary's law of apportionment. *Johns-Manville Products Corp.* v. *Comm. of Rev. Adm.*, 115 N.H. 428 (1975) appeal dismissed, 423 U.S. 1069 (1976). "Plaintiff argues further that since Mississippi has taxed the entire gain [from the sale of land located in Mississippi], the decision of the board will result in multiple taxation. Even if this were a valid objection, [citations omitted], plaintiff's complaint should not be directed against New Hampshire whose tax is fairly apportioned and constitutionally proper." 115 N.H. at 430.

The essence of this appeal is that since the geographical source of a component of income can be traced to a location outside of a taxing State, that State must exclude the component of income from its apportionment formula. This is a common problem among the States. Typically multistate, multinational corporations attempt to exclude interest, dividends, capital gains, rents, royalties and management fees. Any decision which allows the exclusion of one component of income implicitly jeopardizes all other components of the States' tax base.[7] This, in turn, affects tax rates, it affects the fairness of a tax system to all taxpayers and it affects the states vying with each other to attract business.

When asked, the State Supreme Courts have consistently focused on the unitary nature of the business organization and the activities which are integral to its overall profitability. These Courts have unanimously decided in favor of apportioning income which is generated by the business activities of the taxpayer rather than attributing income to a geographical source. *Qualls* v. *Montgomery Ward & Co.*, ____ Ark. ____ (decided July 2, 1979) (interest on loans to subsidiary, affiliate, parent and related corporations); *W.R. Grace & Co.* v. *Comm. of Rev.*, ____ Mass. ____ (decided June ____, 1979) (gain on

[7] The taxability of "domestic" dividends and interest was contested by Mobil in its appeal to the Court below. Were this Court to adopt Mobil's argument with respect to either the Due Process Clause or the taxing power of the commercial domicile, it would follow that "domestic" dividends and interest could be excluded from apportionable income.

sale of Miller Brewing Co.); *Albany International Corp.* v. *Halperin*, 388 A.2d 902 (Me. 1978) (capital gains, royalties and interest); *Montana Dept. of Rev.* v. *American Smelting and Refining Co.*, 567 P. 2d 901 (Mont., 1977), appeal dismissed, 434 U.S. 1042 (1978) dividends, interest and capital gains); *ASARCO, Inc.* (formerly *The American Smelting and Refining Co.*) v. *Idaho State Tax Comm.*, ____ P. 2d ____ (decided March 12, 1979), U.S. Docket (No. 78-1839) (interest, rents, royalties, capital gains and some dividends were "business income," some dividends were "nonbusiness income.")

C.

Fairly Apportioned State Taxation Cannot Be Circumvented by Business Transactions Abroad

In the present appeal, Mobil is seeking to avoid fair apportionment. If this Court were to concur, Mobil could allocate 100% of its $637,666,486.18 income from its investments abroad to New York,[8] a State which chooses not to tax such income.[9] Thus, Mobil could effectively secure a substantial competitive advantage for itself.

There is, however, the underlying constitutional issue of whether *any* State can tax income from investments and operations abroad. One of the *Amici*, the Committee[10] On State Taxation, declares that:

[8] 1970-1972 dividend income, *only* per Appendix pp. A 37,51,65.

[9] New York is Mobil's commercial domicile. In urging 100% allocation of income from investments abroad to States of commercial domicile, Mobil side-steps the rights of the States of legal domicile. For example, one of Mobil's subsidiaries, ARAMCO, has its legal domicile in Delaware and its commercial domicile in New York.

[10] The Committee's constitutional argument is not new. In 29 Vanderbilt Law Review, 401, 404 (March, 1976), it is observed that:

> The Committee on State Taxes of the Council of State Chambers of Commerce (cost), which is composed of ninety-two of the

(footnote continued on following page)

> . . . the multiple taxation of which Mobil complains occurs not from overlapping State apportionment formulas (J.S. App C, p. 26a) but from the compounding of tax after tax on the same foreign source income.
>
> * * *
>
> . . . the Vermont tax system discriminates against investment in foreign corporations by domestic operations and to that extent imposes a burden on foreign commerce that does not apply to domestic commerce.
> (Committee's Amicus brief at pp 17, 4a)

Manifestly, by asserting this prerequisite constitutional issue, the Committee is seeking to have its members' income from international investments and ventures declared *wholly exempt*. The Committee's objective cannot be achieved if this Court merely substitutes a commercial domicile test for fair apportionment. Illinois, for example, is the commercial domicile of numerous multinational corporations, just one of which announced that:

> In 1974 the Company's business activities made a net contribution of $1.2 billion towards a favorable U.S. balance of payments (including) . . . other sources of foreign income such as dividends, license fees and interest. (1974 Annual Report, Caterpillar Tractor Co., p. 9)

Thus, if Mobil were to prevail, the result would actually be inimical to the interests of numerous corporations. The Committee recognizes that many of its members could suddenly find themselves subject not to fair apportionment, but to a tax on 100% of their investment income by their commercial domicile. Such a marked change to the established framework of State

(footnote continued from preceding page)

> nation's one hundred largest corporate businesses, apparently takes the basic position that intercorporate dividend income should be exempt from state taxation since it has no 'source' apart from the underlying income-producing activities of the payor corporation.

taxation could sorely test the desire of the Framers of the Constitution "to prevent interstate rivalry and friction". *Department of Revenue vs. Association of Washington Stevedoring Companies*, 98 S.Ct. 1388, 1401 (1978). Obviously the effect on both States and corporations would be revolutionary.

Fortunately, the *Japan Line, Ltd.*,[11] decision relied upon so heavily by both Mobil and the Committee actually *belies* their contentions. It specifically held that:

> The basis for this Court's approval of apportioned property taxation, in other words, has been its ability to enforce full apportionment by all potential taxing bodies.
>
> * * *
>
> ... the medieval maxum *mobilia sequntur personum* ('movables follow the person') ... resulted in personal property being taxable in full at the domicile of the owner. This theory of taxation has fallen into desuetude... (id., 99 S.Ct. at 1818, 1821)

In *Mobil*, this Court confronts no barrier to "its ability to enforce full apportionment by all potential taxing bodies" as it did in *Japan Line, Ltd.* All of Mobil's income from its investments and operations abroad is U.S. income. The Internal Revenue Code (26 U.S.C. § 1, *et seq.*) requires all such income to be reported as part of every corporation's Federal Taxable Income.[12] Whether Mobil chooses to invest its Vermont or Illinois profits in an Alaskan oil subsidiary or a Middle East subsidiary, the same result must follow. Mobil's return on its investments is still derived from and is an integral part of its U.S. income. Mobil would have had neither the investment

[11] *Japan Line Ltd.* v. *County of Los Angeles*, 99 S.Ct. 1813 (April 30, 1979)

[12] To exclude all "foreign" income from Federal Taxable Income would create complex accounting problems equaled only by the difficulty of conducting an accurate tax audit. Every separate item of "foreign" income and expense for each "foreign" transaction would have to be examined to determine if such item was truly "foreign" or "domestic". (See 42 Journal of Taxation, State and Local Taxation, p. 106, Feb., 1975)

capital nor the need to invest in Alaskan or Middle East oil ventures but for the markets, profits and services provided by each of the States in which Mobil conducts its on-going business activities. Thus, the circumstances in Mobil are very different from those in *Japan Line, Ltd.* Mobil's net profits from investments and operations abroad are not "instrumentalities of foreign commerce" used solely as "continuations of international voyages". (id., 99 S.Ct. at pp. 1820, 1815) Unlike the direct property tax in *Japan Line, Ltd.*, there is no danger in *Mobil* that:

> foreign nations disadvantaged by the levy [of a fairly apportioned State tax on Mobil's investment income] may retaliate against American-owned instrumentalities present in their jurisdictions. (id., 99 S.Ct. at 1822)

Clearly, there can be no disadvantage to foreign nations caused by fairly-apportioned State taxes based upon a corporation's Federal Taxable Income. Thus, the Committee's charge that any State taxes, fairly apportioned or not,

> ... would place de facto control over foreign commercial policy in the several States and make decisions at the Federal level on this vital matter subservient to the day-to-day State revenue concerns

is simply untrue. In fact, the Committee's stance could result in severe discrimination against *domestic* investment. If all State taxation could be wholly avoided by U.S. investments and ventures abroad, domestic investments would be comparatively less profitable. Where net profit is the bottom line, such simple avoidance of State taxes would become a pragmatic requirement.

CONCLUSION

Appellant did not present sufficient facts to the Commissioner to establish its entitlement to relief under 32 V.S.A. § 5833(b), and it has not demonstrated in this appeal that the income apportioned by Vermont is unfair or unreasonable in a constitutional sense. *Amici* respectfully urge the affirmance of the judgment of the court below.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of Illinois
160 North LaSalle Street,
Suite 900
Chicago, Illinois 60601

CARL R. AJELLO
Attorney General of Connecticut
92 Farmington Avenue
Hartford, Connecticut 06115

FRANCIS X. BELLOTTI
Attorney General of Massachusetts
2000 McCormick Building
Ashburton Place
Boston, Massachusetts 02108

THOMAS D. RATH
Attorney General of New Hampshire
State House Annex
Concord, New Hampshire 03301

FRED H. MONTGOMERY,

JOHN D. WHITENACK,
Special Assistants Attorney General

LLOYD B. FOSTER,
Litigation Counsel
Illinois Department of Revenue
160 N. LaSalle Street,
Suite 600
Chicago, Illinois 60601

Of Counsel

FILED
AUG 20 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 78-1201

MOBIL OIL CORPORATION,
Appellant,

vs.

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

On Appeal From the Supreme Court of Vermont

Brief Amicus Curiae in Support of Appellee, The Commissioner of Taxes of Vermont, Submitted on Behalf of Standard Oil Company of California

FRANK H. ROBERTS
TONI REMBE
C. DOUGLAS FLOYD
DONALD E. BRADLEY
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1000
Attorneys for Standard Oil Company of California

PILLSBURY, MADISON & SUTRO
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
Of Counsel

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

TABLE OF CONTENTS

	Page
Preliminary statement	1
Interest of Amicus Curiae	1
Summary of the argument	3
Argument	6
I. Mobil's due process argument elevates form over substance and disregards repeated decisions of this Court sustaining properly apportioned state net income taxes	6
II. Mobil's commerce clause argument based on duplicative state taxation rests on speculation and is foreclosed by this Court's decision in *Moorman Mfg. Co.* v. *Bair* (1978) 437 U.S. 267	19
III. Federal tax policy does not preclude imposition of a properly apportioned state net income tax in addition to any income tax imposed at the national level	27
Conclusion	32

TABLE OF AUTHORITIES

Cases

	Page(s)
Adams Express Company v. Ohio, 166 U.S. 185	14
Bass, Etc., Ltd. v. Tax Comm., 266 U.S. 271	8, 21
Butler Bros. v. McColgan, 315 U.S. 501	8, 9
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274	10, 26
Curry v. McCanless, 307 U.S. 357	14
Ford Motor Co. v. Beauchamp, 308 U.S. 331	14
General Motors v. Washington, 377 U.S. 436	26
Harvester Co. v. Dept. of Taxation, 322 U.S. 435	16
Japan Line, Ltd., et al. v. County of Los Angeles, et al., 47 U.S. Law Week 4477	4, 19, 22, 23, 28
Moorman Mfg. Co. v. Bair, 437 U.S. 267	6, 20, 23, 24
Southern Pacific Co. v. McColgan, 68 Cal.App.2d 48, 156 P.2d 81	27
Standard Oil Co. v. Peck, 342 U.S. 382	24
Underwood T'writer Co. v. Chamberlain, 254 U.S. 113	7, 8
U.S. Glue Co. v. Oak Creek, 247 U.S. 321	26
Washington Rev. Dept. v. Stevedoring Assn., 435 U.S. 734	24, 28
Western Live Stock v. Bureau, 303 U.S. 250	26
Wheeling Steel Corp. v. Fox, 298 U.S. 193	13, 14, 15
Wisconsin v. J. C. Penney Co., 311 U.S. 435	16

Statutes

	Page(s)
California Revenue and Taxation Code	
§ 23101, et seq.	2
Internal Revenue Code	
§ 861	21, 31
§ 862	21, 30, 31
§ 863	30, 31
§ 901	21, 29
§ 902	29
§ 904	21, 29
Uniform Division of Income for Tax Purposes Act	
§ 1(a)	11
§ 1(e)	11
§ 4	11
§ 7	11
Vermont Statutes Annotated	
Title 32, § 5832(1)	7
Title 32, § 5833(a)	7
Title 32, § 5833(b)	7, 21

Other Authorities

Hearings, Subcommittee on State Taxation of Interstate Commerce, Senate Committee on Finance (September 18 and 19, 1973) 93d Cong., 1st Sess.	10, 30
J. R. Hellerstein, The Unitary Business Principle and Multicorporate Enterprises, 27 Tax Executive 313	10
Multistate Tax Commission Allocation and Apportionment Regulations	
§ IV.1.(c).(4)	11

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 78-1201

MOBIL OIL CORPORATION,
Appellant,

vs.

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

Brief Amicus Curiae in Support of Appellee, The Commissioner of Taxes of Vermont, Submitted on Behalf of Standard Oil Company of California

PRELIMINARY STATEMENT

Pursuant to Rule 42(2) of the Rules of this Court, this amicus curiae brief in support of appellee is filed with the written consents of appellant and appellee, on file with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

Standard Oil Company of California ("Standard") is a Delaware corporation engaged in essentially the same business as Mobil Oil Corporation ("Mobil"), the appellant in this case. Standard and its subsidiaries conduct an integrated petroleum business throughout the world. As does Mobil, Standard owns a percentage interest in and

has derived dividends from Arabian American Oil Company ("ARAMCO"), a domestic corporation engaged in crude oil production in Saudi Arabia. ARAMCO constitutes a major source of crude oil supplies for Standard's unitary petroleum business.

In the instant case, Mobil argues that New York as the state of its commercial domicile should have the sole and exclusive power to tax all of its dividend income including ARAMCO dividends without any showing that its stockholdings or its dividend income are unrelated to its unitary petroleum business part of which is carried on in Vermont.

Unlike Mobil, Standard maintains the commercial domicile of its unitary business operations in California. In 1967, California adopted as part of the California Bank and Corporation Tax Law (Cal.Rev. & Tax. Code, § 23101, et seq.) the provisions of the Uniform Division of Income for Tax Purposes Act ("UDITPA") which provide for the apportionment of income, including income from intangibles such as dividends, among the various states where the taxpayer conducts its unitary business operations, to the extent that income constitutes "business income" as defined by the Act.

Standard is presently involved in an appeal before the California State Board of Equalization which presents the question whether the dividends received by it from ARAMCO in 1967 constitute apportionable "business income" under the California UDITPA provisions. Standard is contending that these provisions must be construed to require apportionment of all income derived from business-related intangible property, including dividends from jointly held supply companies such as ARAMCO, consistent with the interpretation placed on such provisions by the vast majority of UDITPA states.

Although Vermont's net income tax provisions differ from those of UDITPA, Standard is concerned with Mobil's contention that only the state of "commercial domicile" has the power to tax its ARAMCO and other "foreign source" dividends. Such a contention, if accepted, would severely impair the proper application of UDITPA in California and the other states that have adopted the uniform apportionment and allocation rules contained therein. It also necessarily would foreclose the rights of all nonheadquarter states where a corporate taxpayer conducts substantial business activities from including business-related dividend income in the net income tax base subject to apportionment.

SUMMARY OF THE ARGUMENT

There is no substance to Mobil's due process "nexus" argument. Repeated decisions of this Court have affirmed that where a corporation conducts an integrated or unitary business within as well as without the boundaries of a taxing state, that state is not bound by the artificialities of separate accounting for particular items of income, but may base its tax on a fairly apportioned share of the entire net income generated by that business. Absent "clear and cogent" evidence to the contrary, it must be assumed that such an apportioned net income tax does not reach extraterritorial values, but only income fairly attributable to that part of the business conducted within the taxing state.

In the instant case, Mobil makes no effort to challenge the fairness of Vermont's apportionment formula. Rather it asserts that certain income must be excluded from Vermont's apportionable net income base merely because of the form of the income, i.e., dividends received by Mobil from its operating subsidiaries and affiliates. Mobil asserts that the stock of these subsidiaries and affiliates is "held" and "managed" outside Vermont. But where such stock is formally "held" or "managed" or where dividends are "received" are purely matters of form having no constitutional significance. Mobil has presented no evidence that could support an inference that its acquisition and management of the stocks of its operating subsidiaries and affiliates were unrelated to its unitary petroleum business conducted in part within the State of Vermont. There is nothing in the record to support Mobil's suggestion that such stockholdings were "passive investments" unrelated to its unitary petroleum business. That being true, Mobil's due process argument has no substantial basis.

The specific allocation approach advocated by Mobil artificially allocates a class of business-related income to the state where a corporation maintains its "commercial domicile" on the basis of an archaic legal fiction. As a matter of due process, this approach is far less defensible than the fair apportionment of such income to all states in which the integrated business activities of the taxpayer are conducted.

Mobil's commerce clause argument is based on a misconstruction of this Court's decision in *Japan Line, Ltd.* v. *County of Los Angeles* (April 30, 1979) 47 U.S. Law

Week 4477. *Japan Line* expressly was limited to a state ad valorem property tax imposed directly on foreign owned and based shipping containers used exclusively as instrumentalities of foreign commerce. This Court viewed such a state property tax as a regulation of foreign commerce which was inconsistent with clearly established Federal policy.

In contrast, a properly apportioned state income tax, such as that of Vermont, involves no regulaton of foreign commerce or its instrumentalities, no inconsistency with Federal policy, and no danger of forbidden duplicative taxation. By its very nature, such a tax is not intended to and does not reach foreign instrumentalities, activities or income, but is confined to a share of the corporation's income fairly attributable to its domestic activities within the borders of the taxing state. No Federal treaty or statute has ever been thought to restrict the ability of the states to impose properly apportioned net income taxes on income fairly attributable to activities within their borders in addition to any income taxes imposed on the worldwide income of a domestic corporation at the national level.

Mobil acknowledges that there is no basis for immunizing the dividend income in question from *any* state taxation by virtue of its alleged "foreign source" as would be true if the holding of *Japan Line* were in point. To the contrary, it affirmatively argues that the state of commercial domicile possesses the power specifically to allocate and tax the *entire* dividend income in question. Mobil's concern is not with overlapping state and national or for-

eign taxation, but with duplicative income taxation *among the states* as a result of inconsistent rules of apportionment and allocaton. On this record, however, Mobil's fears of such duplicative taxation are entirely speculative and hypothetical, because Mobil has made no effort to establish any such overlapping or duplicative taxation of the income in question. Mobil's hypothetical fear of duplicative taxation thus presents no commerce clause issue beyond that already considered and disposed of in *Moorman Mfg. Co.* v. *Bair* (1978) 437 U.S. 267.

ARGUMENT

I. MOBIL'S DUE PROCESS ARGUMENT ELEVATES FORM OVER SUBSTANCE AND DISREGARDS REPEATED DECISIONS OF THIS COURT SUSTAINING PROPERLY APPORTIONED STATE NET INCOME TAXES.

Insofar as it rests on the due process clause, Mobil's argument that the dividends in question have no "nexus" with Vermont for net income tax apportionment purposes ignores settled decisions of this Court, elevates form over substance, and is in any event without support in the record.

The Vermont tax in question does not attempt to tax "New York dividends" as such, any more than it separately taxes any other item of the gross income or receipts of Mobil Oil Corporation. Instead, it seeks to reach only the *net income* of the corporation properly attributable to its activities carried on within the State of Vermont. Because Mobil conducts an integrated petroleum business which is carried on within as well as without the State of Vermont, the Vermont tax is by necessity imposed only upon that

portion of the net income of the corporation "allocated or apportioned to this state" (32 Vt.Stat.Ann., § 5832(1)) under a conventional three-factor apportionment formula.[1] This apportionment method expressly is designed to "allocate to this state a fair and equitable portion of [the corporation's net] income" (id., § 5833(a)) and is subject to modification if the taxpayer demonstrates that the portion of its income attributed to the state "does not fairly represent the extent of the business activities of [the] corporation within this state" (id., § 5833(b)).[2]

The validity of an apportionment method for attributing net income to a taxing jurisdiction has been sustained by numerous decisions of this Court, which are controlling here. In *Underwood T'writer Co.* v. *Chamberlain* (1920) 254 U.S. 113, the corporate taxpayer offered evidence that virtually all of its net profits had been "received" in states other than Connecticut, which had nonetheless apportioned 47% of the corporation's entire net income to its operations within that state. Sustaining the tax, Mr. Justice Brandeis noted that the state "was faced with the impossibility of allocating specifically the profits earned by the

---

[1]The formula apportions Mobil's income to Vermont on the basis of the ratios of Mobil's property, payroll, and sales in Vermont to its property, payroll, and sales everywhere.

[2]The quoted provisions were those in effect during the tax years in question. In the case of Vermont, for the year 1972, Vermont's three-factor apportionment formula based on property, payroll, and sales in the State of Vermont as compared with those of Mobil everywhere, attributes less than two-tenths of one per cent or only .18% of Mobil's Federal taxable income (which was in excess of $232 million) to Mobil's Vermont operations thereby producing a tax of approximately $25,000 (App., p. A79). In contrast, by excluding its dividends from apportionable net income, Mobil reported an apportionable loss from its domestic operations, and accordingly paid the minimum Vermont tax of $25 for 1972.

processes conducted within its borders" (254 U.S. 121). Therefore it "adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the State" (ibid.).

And in *Bass, Etc., Ltd.* v. *Tax Comm.* (1924) 266 U.S. 271, this Court for the same reason sustained New York's apportionment of a percentage of the net income of a British corporation selling ale in New York, even though the corporation had reported no taxable income for Federal income tax purposes, but had attributed its income entirely to foreign sources (266 U.S. 279). Against the taxpayer's contention, much the same as that of Mobil in the instant case, that the tax was not based on its New York business but upon its "net income derived from business carried on outside of the United States" (266 U.S. 280), this Court observed that the corporation "carried on the unitary business of manufacturing and selling ale, in which its profits were earned by a series of transactions beginning with the manufacture in England and ending in sales in New York and other places" (266 U.S. 282). "The fact that the Company may not have had any net income upon which it was subject to payment of income tax to the Federal Government, obviously does not show that it received no net income from the business which it carried on in New York" (266 U.S. 283).

Over 35 years ago in *Butler Bros.* v. *McColgan* (1942) 315 U.S. 501, this Court explained why the artificialities of separate accounting could not be allowed to impede a state's effort to tax a share of a corporate taxpayer's net income fairly attributable to its activities conducted and protection received within the state. Although the tax-

payer's books showed a net loss for its California operations (315 U.S. 505), this Court held that it had not carried its "distinct burden of showing by 'clear and cogent evidence' that [the apportionment formula] results in extraterritorial values being taxed" (315 U.S. 507). As to the separation of income shown in the taxpayer's accounts, this Court explained:

> "It is true that appellant's separate accounting system for its San Francisco branch attributed no net income to California. But we need not impeach the integrity of that accounting system to say that it does not prove appellant's assertion that extraterritorial values are being taxed. Accounting practices for income statements may vary considerably according to the problem at hand [citation omitted]. A particular accounting system, though useful or necessary as a business aid, may not fit the different requirements when a State seeks to tax values created by business within its borders. * * * [T]he particular system used may not reveal the facts basic to the State's determination" (315 U.S. 507-508).

Although the question of the inclusion of dividends in apportionable income was not specifically presented in *Butler Bros.*, its reasoning is fully applicable. This Court's rejection of any constitutional requirement for "separate accounting" applies equally to Mobil's argument for specific allocation of intangible income, such as dividends, to a fictional "situs" under the outmoded doctrine of *mobilia sequuntur personam*, which is only a variation on the theme of separate accounting. The fact that Mobil has chosen to carry on part of its worldwide petroleum business through controlled subsidiaries from which it receives

dividends, rather than through divisions, is not a difference of constitutional dimension. To reach that conclusion would truly be a "triumph of formalism over substance" (*Complete Auto Transit, Inc.* v. *Brady* (1977) 430 U.S. 274, 281). A corporation's ability to arrange its corporate affairs to receive a substantial portion of its business income in the form of dividends from controlled subsidiaries cannot affect the underlying business reality(see J. R. Hellerstein, The Unitary Business Principle and Multicorporate Enterprises, 27 Tax Executive 313, 317-318).

Although uniform rules for the division of income for state tax purposes are still in the evolutionary process, the vast majority of states which have enacted a net income tax include business-related dividends in a corporate taxpayer's apportionment base, without regard to the fact that the underlying stock may be held or managed outside of the taxing state. Such an approach is consistent with that advocated by Jerome R. Hellerstein, Esq., a prolific author in the state taxation area, when he testified before the Subcommittee on State Taxation of Interstate Commerce of the Senate Committee on Finance in 1973. In opposing a bill (S. 1245) which would have excluded dividends from the apportionable tax base, and to the extent received from "foreign sources," excluded them from state taxation altogether, Professor Hellerstein observed in 1973 that:

> "[I]f a manufacturing company receives dividends from its wholly-owned subsidiary which is engaged principally in selling the product of the parent company, the dividends constitute a part of the profits derived from the parent-subsidiary unitary business. *Such profits constitute operating income, income of*

> *the business, just as they would if the enterprise were conducted through sales branches, instead of a subsidiary. Such dividends ought to be apportioned as part of the basic operating income of the enterprise* * * *" (Hearings (September 18 and 19, 1973) 93d Cong., 1st Sess., p. 163) (emphasis supplied).

To be sure, this approach, consistent with the provisions of the Uniform Division of Income for Tax Purposes Act, advocates only that "business" as opposed to "non-business" dividends be subject to apportionment and that "non-business" dividends be allocated to the state of commercial domicile (UDITPA, §§ 1(a), 1(e), 4, 7). Under UDIPTA, income from tangible and intangible property, including dividends on stock, constitutes "business income" subject to apportionment if "the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations" (§ 1(a)). Similarly, the regulations of the Multistate Tax Commission under UDIPTA provide, with respect to dividend income, that:

> "Dividends are business income where the stock with respect to which the dividends are received arises out of or was acquired in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the stock is related to or incidental to such trade or business operations" (Multistate Tax Commission Allocation and Apportionment Regulations (February 21, 1973) § IV.1.(c).(4)).

In an apparent effort to invoke the "business," "non-business" distinction, Mobil asserts that "the activities, personnel and property of Mobil in Vermont, in which only the marketing of petroleum and related products was con-

ducted, have nothing to do with Mobil's holding of stocks in foreign subsidiaries or affiliates or its foreign investments, or the dividend income they produce" (Appellant's Br., p. 10), and characterizes its activities with respect to its stock and dividends as its "business * * * as a holding and investing company" (id., p. 31).

However, Mobil has introduced no evidence to support an assertion that the dividends in question have no relation to its unitary petroleum business a part of which is carried on in Vermont, but are merely the product of unrelated passive investments. The only support offered by Mobil in support of its unrelated "investment income" characterization is a reference to certain paragraphs (7, 11, 26-27) of a document which it describes as a "Stipulation of Facts" (Appellant's Br., pp. 4-5, 9). This document which is contained in the Appendix (pp. A79-A91) was not a stipulation, but was a unilateral statement submitted by Mobil in the state tax proceedings. It contains the following description of the stocks, dividends and income in question:

> "The aforementioned capital stocks were held, managed and controlled by Mobil from its offices outside Vermont. Payment of all dividends was received by Mobil outside Vermont and Mobil's control, use and disposition of such dividends were managed and directed from Mobil's offices outside Vermont" (App., p. A83, par. 11).
>
> "More than 99% of the dividends here in issue were received from corporations deriving all or all but an insignificant portion of their income from sources outside the United States" (App., p. A88, par. 26).

But whether the stock certificates of the subsidiaries in question were "held" or "managed" by Mobil outside of the State of Vermont, or whether the earnings out of which the dividends were paid had a foreign or domestic "source," are irrelevant to the due process issue now before the Court, *because those "facts" say nothing about the relationship of the stockholdings or the companies from which the dividends were paid to Mobil's integrated, unitary petroleum business* conducted within as well as without the State of Vermont. The careful phraseology of Mobil's unilateral "Stipulation" is noteworthy primarily *because* of its studious omission of the slightest mention of the nature of the business activities of the subsidiaries from whose earnings the dividends were received, or the relationship of its stockholdings to the petroleum business conducted by Mobil in Vermont and elsewhere in the United States. It is only if there were no such relationship at all that the due process "nexus" issue that Mobil seeks to raise could be presented for resolution by this Court.

Mobil's citation of such cases as *Wheeling Steel Corp.* v. *Fox* (1936) 298 U.S. 193, ostensibly in support of the rule that the state of commercial domicile and *only* that state has the right to tax its intangibles (Appellant's Br., pp. 10, 31), disregards the fundamental distinction between the *property* taxes involved in those decisions and the tax on apportioned net income here. Even in the property tax area, this Court has recognized far more leeway for state taxation of intangibles than Mobil acknowledges. In the *Wheeling Steel* case, this Court recognized that intangibles which are integral parts of a local business may acquire

a "business situs" supporting their taxation for property tax purposes at other than the legal domicile of their owner (298 U.S. 210). And this Court has long sustained the determination of local property or corporate franchise values by reference to the value of intangible property utilized in the business of the taxpayer without regard to its alleged "location" outside the taxing state (*Ford Motor Co.* v. *Beauchamp* (1939) 308 U.S. 331, 335-336; *Adams Express Company* v. *Ohio* (1897) 166 U.S. 185, 222). In *Curry* v. *McCanless* (1939) 307 U.S. 357, this Court rejected the contention that notions of "fictitious situs" (307 U.S. 369) of intangibles which in reality have "no physical characteristics" and may be "associated in numerous intimate ways" (307 U.S. 362-363) with a number of states can limit the taxation of intangibles to a single jurisdiction. To the contrary:

> "[W]hen the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, and the rule is not even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each state concerned to tax" (307 U.S. 367).

Further:

> "We find it impossible to say that taxation of intangibles can be reduced in every case to the mere mechanical operation of locating at a single place, and there taxing, every legal interest growing out of all the complex legal relationships which may be entered into between persons. This is the case because in point of actuality those interests may be too diverse in their relationships to various taxing jurisdictions to admit of unitary treatment * * *. The Fourteenth Amendment cannot be carried out with such mechanical nicety without infringing powers which we think have not yet been withdrawn from the states" (307 U.S. 373).

In any event, Mobil's argument fundamentally fails to deal with the fact that the Vermont income tax is not a tax *on* the intangibles themselves (in which event it might be argued that the state in which such rights are "held" or managed may have some independent basis for taxation by virtue of that fact alone). Rather, the Vermont tax is a tax on the net income of the corporation properly apportioned to its activities in Vermont. In the *Wheeling Steel* case itself, this Court recognized that property tax notions of "situs" or "location" are beside the point in the present context:

> "The tax is not on the net profits of a unitary enterprise demanding a method, not intrinsically arbitrary, of making an apportionment among different jurisdictions with respect to the processes by which the profits are earned. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 120, 121; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U.S. 271, 282, 283; *Hans Rees' Sons* v. *North Carolina, supra.* Such a tax on net gains is distinct from an *ad valorem* property tax on the various items of property owned by the Corporation and laid according to the location of the property within the respective tax jurisdictions" (298 U.S. 212) (emphasis in original).

This Court has made clear that the fact that intangibles may be viewed under some conceptions as "located" outside

the taxing jurisdiction in no way precludes the fair apportionment of income or values associated with those intangibles to the jurisdiction where the business activities of the corporation have been conducted and where, accordingly, that income or value may fairly be said to have arisen (*Harvester Co.* v. *Dept. of Taxation* (1944) 322 U.S. 435). Nor is it of constitutional significance that the taxpayer has arranged for its stock to be "held" or "managed" outside the taxing jurisdiction, or that its dividend income is formally "received" there, as Mobil alleges. "The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction" (*Wisconsin* v. *J. C. Penney Co.* (1940) 311 U.S. 435, 445).

Such facts as there are in the record make it quite clear that the dividends in question were not the product of mere passive investments in stocks and businesses unrelated to Mobil's unitary petroleum business, but were integrally related thereto. Even putting aside the fact that the dividends in question constituted a significant component of Mobil's taxable Federal income (App., p. A83), the subsidiaries from which the dividends were received are repeatedly characterized as "operating subsidiaries" in Mobil's own unilateral "Stipulation" (App., pp. A84-A87, A89-A90). The primary payors of the dividends in question are specifically identified in the record as including "Mobil Marine Transportation Limited," and two major sources of foreign crude production, "Mobil Oil Iraq with Limited Liability," and the "Arabian American Oil Company" (App., pp. A75-A76). Mobil does not disclose the precise nature of the business conducted by these and its other dividend-paying

subsidiaries and affiliates, but obviously there is no basis for assuming that these "investments" are unrelated to Mobil's petroleum business. To the contrary, in a description of its business filed in connection with a California action in which Mobil is claiming a refund of California franchise taxes, Mobil points out that:

> "The Taxpayer also imported crude oil for use by its various refineries in the United States outside California from certain of its foreign subsidiaries. The total amount of crude oil used in the refineries of the Taxpayer within the United States which was purchased from its foreign subsidiaries or non-affiliated companies and was derived from sources outside this country accounted for approximately 18%, 22%, 26%, 21% and 28% of its refinery runs in the United States for the respective years 1967, 1968, 1969, 1970 and 1971" (*Mobil Oil Corporation* v. *Franchise Tax Board of the State of California*, San Francisco Superior Court No. 723-863, Exh. 1 to Complaint, p. 14).
>
> "During the years 1967-1971 most of the Taxpayer's ocean tanker fleet was operated under foreign flag and was owned by some sixteen foreign subsidiaries as defined in I *supra*. * * * To the extent that the Taxpayer's United States operations used foreign crude oil, such crude was transported by this fleet" (id., p. 24).

In this setting, Mobil's contention that all of its dividend income must be specifically allocated to the state of commercial domicile is entirely unfounded. As a matter of due process, the state in which a multistate or multinational corporation maintains its commercial domicile has no greater claim for taxing dividends received from stock held in connection with the corporation's unitary business than any other state in which that unitary business is conducted.

Due process is served, not hindered, by the use of the apportionment formula in assigning dividends, interest, royalties or other income from business-related intangibles for state income tax purposes. Indeed, this is a far more reasonable method from a due process standpoint than artificially allocating such income in full to a single state simply because the business headquarters or management staff of the corporation happens to be located there. The "commercial domicile" rule for assigning a taxable situs to intangibles has its historical origin in a legal fiction, the doctrine of *mobilia sequuntur personam,* which if arbitrarily applied to state net income taxes would unjustifiably favor the state of commercial domicile at the expense of other states where substantial business activities are conducted. As a number of "corporate headquarters" states such as New York impose reduced or no income taxes on such dividend income, to sustain Mobil's contention would inevitably lead to the insulation of large portions of the business income of corporate taxpayers headquartered in such jurisdictions from income taxation by any state.

The record demonstrates that Mobil was engaged in integrated business activities within and without the State of Vermont. In arriving at its Vermont net income tax base, Mobil deducted in full the salaries of management personnel working at its business headquarters in New York, as well as the salaries and wages of all other unitary business employees. Mobil also deducted all other business expenses including those incurred in the New York phase of its unitary business. The state of commercial domicile is certainly entitled to its properly apportioned share of the net income of a multistate corporate taxpayer. However, Mobil's assertion that New York, as the state

of commercial domicile, should be entitled specifically to allocate and tax 100% of its dividend income to the exclusion of all other states in which substantial business activities are conducted runs contrary to the fundamental due process goal of fairly distributing the net income of a multistate corporate business among all states having jurisdiction to tax.

II. MOBIL'S COMMERCE CLAUSE ARGUMENT BASED ON DUPLICATIVE STATE TAXATION RESTS ON SPECULATION AND IS FORECLOSED BY THIS COURT'S DECISION IN MOORMAN MFG. CO. v. BAIR (1978) 437 U.S. 267.

Mobil's commerce clause argument rests on a series of erroneous assumptions: (1) that Vermont's efforts to tax a fairly apportioned share of a domestic corporation's net income should be treated as an attempt by Vermont to levy a tax on the foreign income of the foreign subsidiaries of that corporation; (2) that the direct ad valorem property tax on foreign-owned, registered, and based instrumentalities of foreign commerce involved in *Japan Line, Ltd.* v. *County of Los Angeles* (April 30, 1979) 47 U.S.Law Week 4477 should be equated with the tax on an apportioned share of a domestic corporation's net income here involved; (3) that, although admittedly none has been shown to exist in the instant case, this Court would be without power to prevent duplicative state taxation of income derived from foreign commerce should it arise; and (4) that the state of "commercial domicile" has the power (concededly not exercised in the instant case) to tax all of the dividends in question without regard to the relationship of the stocks or activities from which they were derived to the overall multistate business activities of the taxpayer.

In *Moorman Mfg. Co.* v. *Bair* (1978) 437 U.S. 267, this Court reaffirmed its consistent holdings that a claim that an apportioned state net income tax violates the commerce clause must rest on a showing of *actual,* not "speculative," duplicative taxation (437 U.S. 276); that a state's apportionment formula is "presumptively valid" (437 U.S. 277); and that in view of "the legislative power granted to Congress by the Commerce Clause," it was "to that body, and not this Court," that the Constitution commits the task of enacting uniform rules for the division of income (437 U.S. 280).

The result in the instant case is a simple one after *Moorman,* because Mobil has made no effort to demonstrate any duplicative state taxation of the dividend income in question—indeed it concedes that New York, which it asserts to have the exclusive right to tax its dividend income as the state of "commercial domicile," effectively imposes no tax at all on such dividends (Appellant's Br., p. 33). And whereas the "single-factor" apportionment practice upheld in *Moorman* was decidedly out-of-step with that followed in most other states, the practice of apportioning some or all dividend income to the states in which a corporation does business, at least absent some showing that the stockholdings from which the dividends are derived are unrelated to the unitary business of the taxpayer conducted in part within the taxing jurisdiction, is followed by most states. Mobil's own brief acknowledges that at least 27 of 34 states which include such dividends in the tax base apportion the dividends if they are classified as "business" dividends (Appellant's Br., p. 27; App., p. 4a). Although Mobil asserts that eight of those jurisdictions

including Vermont also apportion "non-business" dividends, that issue is not presented here. As pointed out (supra, pp. 6-7), Vermont's statutory scheme is expressly designed to reach only income which "fairly represent[s] the extent of the business activities of [the] corporation within this state" (32 Vt.Stat.Ann., § 5833(b)), and Mobil has introduced *no* evidence that would support the conclusion that the dividends in question are unrelated to its unitary petroleum business conducted in part in Vermont.

Nor does the alleged "foreign source" of the dividends in question (Appellant's Br., pp. 7, 38, et seq.) lead to a different result.[3] In *Bass, Etc., Ltd.,* v. *Tax Comm.* (1924) 266 U.S. 271, this Court, in a holding that has been unquestioned since, concluded that although a British corporation had attributed its income entirely to *foreign* sources for Federal income tax purposes, the foreign commerce clause presented no barrier to taxation on a fairly apportioned basis of that allegedly "foreign" income by the State of New York, where the corporation carried on sales activities as part of its unitary business. The result here follows *a fortiori,* for Vermont seeks only to tax a share of the net income of a domestic corporation, fairly apportioned to its retail marketing operations within Vermont.

---

[3]As pointed out below (infra, pp. 27-32), the Internal Revenue Code, solely for the purpose of *determining income tax liabilities at the national level,* contains definitions of domestic and foreign source income (I.R.C., §§ 861, 862) which are relevant primarily in computing the amount of the credit allowed against the Federal income tax for foreign income taxes paid (I.R.C., §§ 901, 904). Clearly a state has the power to impose a reasonably apportioned net income tax on a corporation conducting business therein in addition to and distinct from income taxes imposed at the Federal level.

Vermont is not attempting to reach beyond its borders to tax the entire net income of Mobil, let alone to tax the separate income of Mobil's foreign operating subsidiaries. Vermont seeks to reach only a share of the net income of Mobil itself, fairly apportioned to Mobil's activities within the State of Vermont. The fact that Mobil receives a large share of its income in the form of dividends from foreign operating subsidiaries or affiliates does not mean that Vermont's apportioned tax is levied on "foreign" income. Because the tax is by definition apportioned to activities within the taxing state, it must be assumed, absent any "clear and cogent" evidence to the contrary (which Mobil has made no effort to present), that only income attributable to Mobil's business and activities within Vermont is taxed.

This Court's decision in *Japan Line, Ltd.* v. *County of Los Angeles* (April 30, 1979) 47 U.S.Law Week 4477, relied on principally by Mobil in support of its commerce clause argument (Appellant's Br., pp. 14, 23-26) is not in point. *Japan Line* did not involve a net income tax properly apportioned to activities within a state, but an *ad valorem* property tax levied directly on foreign-owned cargo containers used exclusively as instrumentalities of foreign commerce. In *Japan Line* this Court specifically noted that "the question here is a * * * narrow one, that is, whether instrumentalities of commerce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State" (47 U.S.Law Week 4480). As the containers had already been subjected to a property tax on 100% of their value in Japan, a tax which

the Japan Government had the right to impose (47 U.S. Law Week 4482) and which this Court was powerless to prevent (id., p. 4481), the levying of even an apportioned property tax by the states on the very same instrumentalities of foreign commerce served to ensure that appellants "'would be paying a double tax'" (id., p. 4482) on the containers.

Thus, in *Japan Line*, state ad valorem taxation of containers could not exist without duplicating Japan's property tax, the imposition of which was beyond the control of this Court or the Congress. In contrast, a properly apportioned state net income tax, by its very nature, does not reach foreign income or duplicate foreign taxes assessed against such income. Recognizing that fact, Mobil does not argue that its allegedly foreign source dividends should be free from *any* income taxation at the state level but rather urges this Court to hold that the entire dividend income in question may be taxed exclusively by the state of commercial domicile (Appellant's Br., pp. 29-31).

Given Mobil's contention that the foreign commerce clause does not preclude the state of commercial domicile from taxing dividends received from domestic or foreign subsidiaries and affiliates in full, it is difficult to see how the speculative possibility that conflicting apportionment formulas among the states may in hypothetical situations—not present here—produce some duplicative taxation among the states raises any issue of constitutional dimension beyond that already considered and disposed of in *Moorman* (437 U.S. 276-277). The time to deal with multiple state taxation of income arising from the conduct of foreign commerce as a result of conflicting or overlapping state apportionment

and allocation formulas will arise when the taxpayer has demonstrated such a result in the particular case. "[E]rrors of apportionment that may lead to multiple burdens may be corrected when they occur" (*Washington Rev. Dept.* v. *Stevedoring Assn.* (1978) 435 U.S. 734, 746). This Court most assuredly *can* referee the competing claims of states to tax income fairly attributable to domestic operations within their respective borders wherever the taxpayer can demonstrate that the apportionment and allocation procedures of a particular state, either alone or in combination with those of other jurisdictions, actually result in the duplicative taxation of income arising from interstate or foreign commerce (*Moorman Mfg. Co.* v. *Bair* (1978) 437 U.S. 267, 281). There is no such evidence here.

In this connection, Mobil's fear that particular dangers of duplicative state taxation are present with respect to its dividend income because of "the power of the state of a corporation's commercial domicile to tax the corporation's dividends, without apportionment" (Appellant's Br., pp. 29-30), is not only hypothetical on the present record, *but disregards the fact that this Court has never accepted such a sweeping proposition.* Even in the property tax area, the "commercial domicile" rule has had to yield to apportionment. In *Standard Oil Co.* v. *Peck* (1952) 342 U.S. 382, Ohio contended that the taxpayer's barges were taxable entirely in the state of commercial domicile, despite their extensive business operations elsewhere. This Court reasoned that because the other states in which the corporation did business had the right to tax the barges on an apportioned basis, "the rule which permits taxation by two or more states on an apportioned basis precludes taxation of all of the property by the state of domicile" (342 U.S. 384).

Moreover, this Court has never held that the state of commercial domicile may impose an unapportioned net *income* tax on income merely because it has been received in the form of dividends on stock, without regard to the relationship of such stockholdings to the business operations of the taxpayer in other jurisdictions. Nor is it likely that the Court would accept such a proposition which is contrary to the modern trend of fairly dividing the net income of a multistate corporation among all states having jurisdiction to tax.

The threat of an undue burden on foreign commerce from state income taxation would be much greater if, as Mobil suggests, the state of commercial domicile were allowed specifically to allocate to itself 100% of "foreign source" dividends for state income tax purposes. Under apportionment, the state tax base is *net* income, which permits the gross income of a corporation from business-related dividends or other sources to be reduced by losses or other deductible expenses in arriving at the net income subject to apportionment.

In contrast, the specific allocation approach advocated by Mobil could result, in effect, in a tax on *gross* income or receipts, because a corporation's business-related dividend income would be dissociated from its business-related expenses and arbitrarily assigned entirely to the state of commercial domicile. Under Mobil's approach, as under a gross receipts tax, a corporation domiciled in a state which (unlike New York) includes the full amount of such dividend income in the tax base could face a substantial tax burden even though it had sustained a loss on its overall business operations. For example, a corporation sustain-

ing $2 million of operating losses and receiving $1 million of foreign source dividends or interest income would be subjected to a tax on virtually the gross amount of such income by the commercial domicile state if by application of the apportionment formula only a small amount of the corporation's operating losses were attributed to such state.[4] For this very reason, this Court has frequently recognized that a gross receipts tax, particularly if not fairly apportioned to business activities within the taxing jurisdiction, places a far greater burden on interstate commerce than does an apportioned net income tax (*U.S. Glue Co.* v. *Oak Creek* (1918) 247 U.S. 321, 328-329; see also, *Western Live Stock* v. *Bureau* (1938) 303 U.S. 250, 255-256; *General Motors* v. *Washington* (1964) 377 U.S. 436, 440).

The rule of fair apportionment of income arising in connection with the unitary business operations of a corporate taxpayer to the states in which it conducts its business, far from being "inherently distorting" as Mobil asserts (Appellant's Br., p. 31), has long been accepted by this Court as the touchstone of constitutional adjudication in this area. Whether the income is received in the form of dividends or otherwise is of no constitutional significance. It is the substance and reality of the situation that controls, not the form (*Complete Auto Transit, Inc.* v. *Brady* (1977) 430 U.S. 274, 288). Mobil has made no showing in this case that its stocks from which the dividends in question were

[4]Under this approach, New York in the instant case could tax more than 100% of Mobil's net income. Since Mobil's dividends constituted 121% of its Federal taxable income for 1972, Mobil could be taxed in New York on more than its net income if New York were permitted specifically to allocate such dividends for net income tax purposes.

derived were not held for the purposes of its unitary petroleum business, or that the operations of its dividend-paying subsidiaries were unrelated to that business. In such a case, the "claim of the State of commercial domicile to tax in their entirety the dividends of a corporation," far from being "compelling" (Appellant's Br., p. 31), has no substantial basis at all.[5]

III. FEDERAL TAX POLICY DOES NOT PRECLUDE IMPOSITION OF A PROPERLY APPORTIONED STATE NET INCOME TAX IN ADDITION TO ANY INCOME TAX IMPOSED AT THE NATIONAL LEVEL.

Mobil's argument that the inclusion of the alleged "foreign source" dividends in the Vermont net income tax apportionment base conflicts with established Federal policy and impermissibly regulates foreign commerce not only is based on a misapplication of this Court's *Japan Line* decision, but also ignores the fundamental distinction between state income taxes and income taxes imposed at the national level.

[5]State court income tax cases cited by Mobil such as *Southern Pacific Co.* v. *McColgan* (1945) 68 Cal.App.2d 48, 156 P.2d 81 (Appellant's Br., p. 30), were primarily concerned with whether the claim of the state of commercial domicile of a corporation outweighed that of the technical "legal" domicile, and not with the resolution of competing claims to tax an apportioned share of such income by the states in which the taxpayer's business operations were actually conducted. In *Southern Pacific*, dividends were allocated to a corporation's business headquarters in California, in preference to Kentucky, the state of its legal domicile, or New York, where the dividends were received and the underlying stock held and where the Company's board of directors and executive committee held their meetings. Unlike the instant case, there was no evidence in *Southern Pacific* that any of the states in which the taxpayer conducted its unitary business operations sought to tax an apportioned share of the dividend income in question (68 Cal. App.2d 53).

In *Japan Line* this Court noted that state property taxation of foreign based and registered instrumentalities of foreign commerce might "impair federal uniformity in an area where federal uniformity is essential" and prevent the Federal government from speaking with "one voice" in the regulation of foreign commerce (47 U.S.Law Week 4481). This conclusion was based primarily on a Customs Convention signed by the United States and Japan exempting containers used exclusively in foreign commerce from "all duties and taxes whatsoever chargeable by reason of importation" (47 U.S.Law Week 4482).

There is no similar basis for concluding that a properly apportioned state net income tax constitutes impermissible state regulation or interference with foreign commerce. No treaty precludes such a tax directly or by implication.[6] As this Court noted in sustaining the application of Washington's business and occupation tax to the business of stevedoring in *Washington Rev. Dept.* v. *Stevedoring Assn.* (1978) 435 U.S. 734:

> "[T]he tax does not restrain the ability of the Federal Government to conduct foreign policy. As a general business tax that applies to virtually all businesses in the State, it has not created any special protective tariff. The assessments in this case are only upon business conducted entirely within Washington. No

[6]Contrary to Mobil's assertion (Appellant's Br., pp. 42-43), the bilateral tax treaties in force between the United States and foreign nations clearly reflect that fairly apportioned state income taxes are not viewed as an impediment to or interference with the policies and objectives sought to be achieved by the Federal government through the treaty process. No existing U.S. tax treaty limits or otherwise regulates state income taxation of domestic corporations. Even in the case of foreign corporations, the only limitation on state taxation in this area is under customary "nondiscrimination" clauses which prevent political subdivisions of the United States from levying *discriminatory* taxes on foreign corporations.

> foreign business or vessel is taxed. Respondents, therefore, have demonstrated no impediment posed by the tax upon the regulation of foreign trade by the United States" (435 U.S. 754).

Contrary to Mobil's contention (Appellant's Br., pp. 38-48), the statutory scheme under which income taxes are imposed at the national level and treaties adopted in connection therewith were never intended to limit a state's power to impose an apportioned net income tax on a multinational corporate enterprise conducting substantial business activities within its borders. Under the Federal tax laws, the entire net income of a domestic corporation, whether received from foreign or domestic "sources", is subject to Federal income tax. For that reason, as a matter of policy, in order to avoid duplicative taxation at the *national* level of earnings derived from sources outside of the United States, the Federal government allows a foreign tax credit (if elected in lieu of a deduction) for foreign income taxes paid directly by domestic corporations (I.R.C., § 901). For similar reasons, the Federal government allows a United States corporate taxpayer receiving dividends from a foreign corporation in which it holds a 10% or greater stock interest an "indirect" or "deemed paid" credit for a proportionate share of foreign income taxes paid on the underlying earnings of the foreign subsidiary out of which the dividends are paid (I.R.C., § 902). Such credits are subject to detailed limitations and, even under Federal law, may not be allowable (I.R.C., § 904). In particular, they may not exceed the amount of the Federal income tax imposed on the corporation's "foreign

source income" as determined under section 862 and 863 of the Internal Revenue Code.

Such provisions are relevant to avoid duplicative taxation of the entire worldwide income of a domestic corporation at the national level. They are irrelevant to an apportioned state net income tax, which by definition reaches only earnings fairly attributable to a corporation's activities within the borders of the taxing state. They were not intended to, and have never been interpreted as, precluding a properly apportioned net income tax at the state level. In 1973 testimony before the Subcommittee on State Taxation of Interstate Commerce of the Senate Committee on Finance (supra, p. 10), Professor Hellerstein recognized that the Federal provisions governing intercompany dividend deductions and foreign tax credits are irrelevant to the state income tax issue. He stated:

> "I should like to comment on the provision of S. 1245 which would prohibit States from taxing dividends received from 50% or more owned subsidiaries, and would bar the taxation of dividends, whether paid by subsidiaries or otherwise, which are treated as foreign source income for Federal income tax purposes * * *. The major argument made by the proponents of this restriction on the State taxing powers is that this is in substance what the Federal government does, through the intercorporate dividend exclusion and the indirect foreign tax credit. * * * *The Federal model appears to me to be irrelevant to State taxation*" (Hearings (September 18 and 19, 1973) 93d Cong., 1st Sess., p. 163) (emphasis supplied).

The provisions of the Internal Revenue Code dealing with the classification of income from sources within or

without the United States cover not only dividends but virtually all forms of income, including interest, rents, royalties, compensation for services, and sales income (see I.R.C., §§ 861-863). If Mobil's argument that the Federal policies underlying the foreign tax credit require that "foreign source" dividends receive special state tax treatment were accepted, it is difficult to see why special rules would not also be dictated for "foreign source" interest, royalties and sales income of a multinational taxpayer. Yet Mobil has not argued for this result in asserting that, as a matter of Federal policy, dividends should not be included in any state net income tax apportionment base.

State income taxes have always been imposed in addition to the Federal income tax, albeit at a fraction of the rate of that imposed by the Federal government. In imposing such a tax, a state has never been required by statute or treaty to grant a credit for income taxes paid to the United States government or to the government of any foreign country, so long as the corporation's net income was fairly apportioned to activities within the state. The fact that a credit for foreign income taxes may be allowed under Federal law with respect to items of "foreign source income" as therein defined is a matter relevant to Federal, not state, income tax policy. The imposition of a properly apportioned state net income tax, in addition to any income taxes imposed at the national level, does not constitute duplicative *state* taxation of income arising from interstate and foreign commerce. It is duplicative taxation of income *among the states* that is the concern of the commerce clause, and such duplication is precluded by a rule of fair apportionment.

CONCLUSION

For the reasons stated, the judgment of the Supreme Court of Vermont should be affirmed.

Respectfully submitted,

FRANK H. ROBERTS

TONI REMBE

C. DOUGLAS FLOYD

DONALD E. BRADLEY
Attorneys for Standard Oil Company of California

PILLSBURY, MADISON & SUTRO
Of Counsel